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No. 02-

IN THE

Supreme Court of the United States

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. — U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL LIFE INSURANCE COMPANY; GERLING AMERICA INSURANCE COMPANY; and CONSTITUTION INSURANCE COMPANY,

Petitioners,

v.

HARRY W. LOW, in his capacity as the COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The California Holocaust Victim Insurance Relief Act ("HVIRA") requires the Petitioners, California-licensed insurers, to provide extensive information regarding every insurance policy issued in Europe between 1920 and 1945 by every European insurer with which the Petitioners have a legal relationship. The Petitioners do not have custody or control over the information demanded and production would violate German data protection laws. Regardless, the HVIRA mandates suspension of the Petitioners' existing California licenses for their failure to comply.

The Eleventh Circuit Court of Appeals has previously determined that, as applied to the Petitioners, a materially identical Florida statute violates the Due Process Clause. *Gerling Global Reinsurance Corp. of America v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001). The Ninth Circuit has rejected this reasoning and has upheld the HVIRA.

The questions presented are:

1. Whether the State of California's attempt to investigate and regulate insurance policies issued in Europe by European insurers to European residents exceeds the State's legislative jurisdiction under the Due Process Clause.

2. Whether the HVIRA's provision mandating suspension of an insurer's existing business license for failure to provide information outside of that entity's custody or control violates concepts of fundamental fairness embodied in the Due Process Clause.

3. Whether the HVIRA, which interferes with U.S. foreign policy initiatives, international obligations and the law of foreign nations, violates the foreign affairs doctrine articulated in *Zschernig v. Miller*, 389 U.S. 429 (1968).

LIST OF PARTIES AND RULE 29.6 STATEMENT

The following entities were also parties at the Court below and are being served as respondents herein:

Harry W. Low, in his capacity as the Commissioner of Insurance of the State of California;

American Insurance Association;

American Re-Insurance Company;

Assicurazioni Generali S.p.A.;

Winterthur International America Insurance Company;

Winterthur International America Underwriters Insurance Company;

General Casualty Company of Wisconsin;

Regent Insurance Company;

Southern Insurance Company;

Unigard Indemnity Company;

Unigard Insurance Company; and

Blue Ridge Insurance Company

Gerling Global Reinsurance Corporation of America, Gerling Global Reinsurance Corporation-U.S. Branch; Gerling Global Life Reinsurance Company; Gerling Global Life Insurance Company; Gerling America Insurance Company; and Constitution Insurance Company identify the following parent corporations and all publicly traded companies that own ten percent or more of their stock:

Gerling-Konzern Allgemeine Versicherungs AG;

Deutsche Bank;

Gerling-Konzern Versicherungs-Beteiligungs-AG;

Gerling-Konzern Globale Rückversicherungs AG; and

Gerling Global U.S. Investments, Inc.

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Cited Authorities

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Secondary Sources:

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K. Schwerin, *German Compensation for Victims of Nazi Persecution*, 67 NW. U.L. Rev. 479-527 (1972) 6

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Gerling Petitioners[1] respectfully petition for a writ of certiorari to review the opinions of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's initial opinion (per Shubb, D.J.) entering a preliminary injunction (App., *infra*, 104a-139a) was not published. The court of appeals' opinion (per Graber, C.J.) rejecting the reasoning of the district court and remanding (App., *infra*, 71a-103a) is published at 240 F.3d 739. The district court's subsequent opinion (per Shubb, D.J.) granting Gerling Petitioners' summary judgment motion (*id.*, at 42a-70a) is published at 186 F. Supp. 2d 1099 (E.D. Ca. 2001). The court of appeals' subsequent opinion, as amended (per Graber, C.J.), reversing the district court (*id.*, at 1a-41a) is published at 296 F.3d 832. The court of appeals' order denying rehearing and rehearing *en banc* is not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on July 15, 2002, and issued its amended opinion and order denying rehearing and rehearing *en banc* on September 9, 2002. *Id.* at 40a-41a. Gerling Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the Due Process Clause and the Holocaust Victim Insurance Relief Act (Cal. Ins. Code §§ 13800-13807) are reprinted in the Appendix at 140a-151a. The provisions of the "Knox Bill" (1999) Cal. A.B. 600 are reprinted in the Gerling Petitioners' Lodging at L-36-L-41.

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1. Gerling Global Reinsurance Corp. of America, Gerling Global Reinsurance Corp-U.S. Branch, Gerling Global Life Reinsurance Company, Gerling Global Life Insurance Company, Gerling America Insurance Company and Constitution Insurance Company.

STATEMENT OF THE CASE

The Gerling Petitioners are U.S. and Canadian-based insurers and reinsurers licensed to do business in, among other states, California and Florida. Due to conflicting decisions rendered by the Ninth and Eleventh Circuit Courts of Appeals, the Gerling Petitioners face divergent obligations under materially identical Holocaust-era insurance statutes enacted by California and Florida. The Eleventh Circuit has determined that the demands made by the Florida statute violate due process protections afforded the Gerling Petitioners by the Fourteenth Amendment. *Gerling Global Reinsurance Corp. of America v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001) ("*Gallagher*"); Lodg., *infra*, L-1-L-28. The Ninth Circuit reached the opposite conclusion with respect to the California statute and has effectively authorized the California Insurance Commissioner ("Commissioner") to suspend the Gerling Petitioners' licenses to conduct business for their inability to produce the information demanded. *Gerling Global Reinsurance Corp. of America v. Low*, 296 F.3d 832 (9th Cir. 2002). App., *infra*, 1a-41a.

The district court found that the Gerling Petitioners do not have custody or control over the European insurance information sought by California. The German government has determined that disclosure by the German companies that do possess this information would violate German data protection laws and subject those companies to civil and criminal penalties. Notwithstanding this record, the Ninth Circuit has determined that the Commissioner may demand that the Gerling Petitioners do the impossible or face expulsion from the State.

In addition to its direct conflict with the Eleventh Circuit, the Ninth Circuit decision represents a dramatic departure from the well-established due process jurisprudence of this Court. It authorizes California to investigate and regulate insurance transactions which occurred far beyond its borders and which have no identifiable contacts with the state. It strips California

license holders of their right to a meaningful hearing prior to the state's deprivation of their property interests. It also violates the most basic concepts of fundamental fairness by penalizing the Gerling Petitioners for their inability to provide information beyond their control.

The Ninth Circuit decision presents issues of national and international importance. The resolution of Holocaust-era claims has been the subject of U.S. foreign policy since the end of the Second World War. This has resulted in a series of treaties and other agreements with numerous countries. It has also resulted in the enactment of domestic legislation by the Federal Republic of Germany leading to reparation payments of billions of dollars to Holocaust survivors and their heirs. As the United States has expressly stated, "the premise of the California legislation is in direct conflict with that of United States foreign policy." March 9, 2001 U.S. *en banc Amicus* Brf. at 1. ER 1255.[2]

Notwithstanding the foregoing, and in disregard to the repeated complaints of interference with foreign policy raised by the United States, Germany and Switzerland, the Ninth Circuit simply refused to follow this Court's precedent in *Zschernig v. Miller*, 389 U.S. 429 (1968), with respect to the Gerling Petitioners' facial and as-applied foreign affairs challenges to the HVIRA. Such blatant refusal to follow this Court's precedent clearly mandates review.[3]

1. The Statutory Scheme.

On October 8, 1999, California Governor Gray Davis signed into law Assembly Bill No. 600, the "Knox Bill." Lodg., *infra*, L-36-L-41. The Knox Bill represents California's attempt to use its leverage over local insurers to force European insurers,

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2. Citations to "ER" and "SER" refer to excerpts of record and supplemental excerpts of record in the court of appeals.

3. The Gerling Petitioners also join in and fully adopt the questions presented and arguments set forth in the Petition for a Writ of Certiorari in *American Ins. Ass'n v. Low* (No. 02-).

over whom California has no jurisdiction, to produce information concerning every insurance policy in effect in Europe between 1920 and 1945. *See* Cal. Ins. Code § 13801(e). California undertook this mission to achieve a clearly defined goal – to aid in "the rapid resolution" of Holocaust insurance claims arising out of policies issued in Europe. Lodg., *infra*, L-39.

To that end, the Knox Bill extended the statute of limitations for claims arising under such European policies until December 31, 2010, nullified forum selection provisions contained in European policies, vested California state courts with jurisdiction over related claims, and provided that California-licensed companies could be held directly liable for claims arising out of policies issued by a "related company." Lodg., *infra*, L-36-L-41. The Knox Bill also purported to modify the value of pre-1945 European policies by eliminating the effects of post-war currency devaluation. Lodg., *infra*, L-39.

The Knox Bill introduced an expansively-worded definition of the term "related company" to throw the broadest possible net over the European insurance industry: "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer." Lodg., *infra*, L-39; Cal. Ins. Code § 13802. This definition is not limited to companies within the same "corporate family," but extends to entities with little more than contractual or other legal relationships with the California company. *Id.*

The reporting portion of the Knox Bill is known as the Holocaust Victim Insurance Relief Act (the "HVIRA" or the "Act") and was codified at Cal. Ins. Code §§ 13800-13807. The remaining portions of the Knox Bill were codified at Cal. Code Civ. Pro. § 345.5. Lodg., *infra*, L-37-38. The HVIRA requires all California-licensed insurers to provide the Commissioner with information regarding every European insurance policy issued by it or a "related company" in effect

between 1920 and 1945.[4] Cal. Ins. Code § 13804(a). The information required includes: the number of policies; the holder, beneficiary and current status of those policies; and the city or origin, domicile or address for each policy holder listed in the policies. *Id.* The HVIRA further requires the California insurer to certify, under threat of criminal penalty, whether: the proceeds have been paid; the beneficiary has been located; the proceeds have not been distributed; or no relevant policies were sold. Cal. Ins. Code § 13804(b).

In the event that the California licensee fails to fully comply with the HVIRA, "[t]he commissioner shall suspend the certificate of authority to conduct insurance business in the state . . ." Cal. Ins. Code § 13806. This penalty is mandatory. Lack of control over the information sought and disclosure prohibitions embodied in European privacy laws are not acceptable defenses. ER 1019-20, 1030, 3179. Moreover, the HVIRA does not expressly provide for an administrative hearing prior to license suspension. Cal. Ins. Code §§ 13800-13807.

The Knox Bill (and resulting HVIRA) largely tracks the Florida Holocaust Victims Insurance Act enacted in 1998. Fla. Stat. Ann. § 626.9543. Lodg., *infra*, L-29-L-33. The most significant difference between the two pieces of legislation is the penalty for non-compliance: the Florida statute merely requires compliance to the "extent possible," Fla. Stat. Ann. § 626.9543(7); Lodg., *infra*, L-31. In contrast, the HVIRA mandates license suspension, irrespective of whether compliance by the California company is possible. Cal. Ins. Code § 13806.

2. U.S. Foreign Policy Initiatives.

The Knox Bill was passed in disregard to 55 years of U.S. foreign policy efforts aimed at securing compensation and reparations for victims of the Holocaust. To date, those efforts

4. The HVIRA only applies to insurers with existing California licenses. Cal. Ins. Code § 13804(a). It does not impose similar reporting obligations on new applicants for California licenses. On its face, therefore, the HVIRA is irrelevant to the licensing process.

have resulted in the payment by Germany (and by the German private sector) of over 100 billion *Deutschmark* to Holocaust victims and their heirs. ER 847.

A. Post-War Reparations

At the conclusion of the Second World War, the United States immediately took steps to provide restitution and compensation for the victims of Nazi oppression. SER 529-57, 562-64. As a result of negotiations in 1952 and 1954, treaties were adopted between the Federal Republic of Germany, the United States, the United Kingdom and France.[5] These treaties included the Convention on the Settlement of Matters Arising out of the War and the Occupation, signed at Bonn on May 26, 1952, as amended by Schedule 4 to the Protocol on the Termination of the Occupation Regime, signed at Paris on October 23, 1954, 332 U.H.T.S. 219 (the "Transition Agreement"). SER 377-462. In the Transition Agreement:

> The Federal Republic [of Germany] acknowledges the obligation to assure in accordance with the provisions of paragraphs 2 and 3 of this Chapter adequate compensation to persons persecuted for their political convictions, race, faith or ideology, who thereby have suffered damage to life, limb, health, liberty, property, their possessions or economic prospects (excluding identifiable property subject to restitution).

SER 400. *See also* K. Schwerin, *German Compensation for Victims of Nazi Persecution*, 67 NW. U.L. Rev. 479-527 (1972).

In accordance with its treaty obligations with the United States and other nations, Germany enacted a comprehensive compensation law (the *Bundesentschädigungsgesetz* ("BEG")) in 1953 to provide for the reimbursement of assets which

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5. A comprehensive discussion of post-War reparations efforts is described in *Burger-Fischer v. DeGussa AG*, 65 F. Supp. 2d 248 (D. N.J. 1999).

had been seized by the Nazis. This statute expressly provides compensation for loss of insurance assets. SER 1437-38. Under the BEG, the Federal Republic of Germany *assumed the obligation* to compensate victims of Nazi oppression as the sole and exclusive remedy for such claims. SER 1437-38.

As a corollary to the BEG's compensation provisions, German law *precludes direct claims against German insurers* for insurance proceeds that were subject to Nazi seizure. SER 466-94, 1438. Under the BEG, Germany obligated itself to compensate victims of Nazi oppression. SER 1436-1438. In a 1953 decision, the Supreme Court of the Federal Republic of Germany held that claims for insurance proceeds appropriated by the Nazi government could not be asserted against the insurers who issued the policies. Instead, such claims must be asserted directly against the Federal Republic of Germany, as legal successor to the Nazi government. SER 464-94.

B. The Executive Agreement

On July 17, 2000, the United States and Germany entered into an Executive Agreement creating the Foundation "Remembrance, Responsibility and the Future" (the "Executive Agreement"). SER 1447-53; ER 818-37. The Executive Agreement is intended to provide a mechanism for "German companies" (as defined in the Executive Agreement) "to respond to the moral responsibility of German business arising from the use of forced laborers and from damage to property caused by persecution, and from all wrongs suffered during the National Socialist era and World War II." SER 1448. With respect to insurance claims, the goal of the Executive Agreement is to secure a measure of compensation to Holocaust victims at the earliest possible date in accordance with the claims procedures established by the International Commission on Holocaust-era Insurance Claims ("ICHEIC").[6] SER 1451.

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6. ICHEIC was established in October 1998 to investigate and resolve Holocaust-era insurance claims. The California Insurance Commissioner is a founding member of ICHEIC. ER 834.

In furtherance of the goals of the Executive Agreement, on August 12, 2000, the German *Bundestag* established the Foundation "Remembrance, Responsibility and the Future" (hereinafter, the "German Foundation") as a sovereign instrumentality of Germany to resolve these claims. ER 1382-84. The German government and German companies have funded the German Foundation in an amount totaling DM 10 billion. SER 1427-28.

In the Executive Agreement, the United States and Germany recognized that it would be in their respective *foreign policy interests* to achieve "all-embracing and enduring legal peace." SER 1449; *see also* ER 818-37. The concept of "all-embracing and enduring legal peace," which is the stated foreign policy interest of the United States, reflects the principle that "German business . . . should not be asked to contribute again [or twice] . . . for any wrongs asserted against German companies arising from the National Socialist era and World War II." ER 1449.

In accordance with its objectives, the Executive Agreement requires the United States government to "use its best efforts . . . with state and local governments" to achieve "all-embracing and enduring legal peace" for "German companies." SER 1451. The Gerling Petitioners and their German affiliates are all "German companies" as that term is defined in the Executive Agreement. *See* Lodg., *infra*, L-44. Therefore, the HVIRA, as applied to them, clearly interferes with the Executive Agreement and its objectives.

In a November 2001 report to the *Bundestag*, the German government noted that disclosure requirements contained in the HVIRA are in contravention to the Executive Agreement. The German government specifically stated that "it is intended that the American commissioners of insurance" shall recognize the Executive Agreement as the "permanent settlement of the insurance policy questions from the Nazi era," and that "additional actions [including administrative actions] against

German insurance companies shall thereby permanently cease." Lodg., *infra*, L-48.

On October 16, 2002, ICHEIC, the German Foundation and the German Insurance Association reached an agreement regarding claims handling procedures and the publication of pertinent insurance records (in a manner satisfying the requirements of European data protection laws). Lodg., *infra*, L70-L89.

3. The Gerling Petitioners.

The Gerling Petitioners are six insurers and/or reinsurers licensed to do business in Florida, California and numerous other states. Not one of the Gerling Petitioners ever issued an insurance policy that was in force in Europe before or during World War II; in fact, five of the six Gerling Petitioners did not even exist at the time of World War II. ER 616.

The Gerling Petitioners are, however, "related companies" with two German insurers that issued policies in Europe during the period in question: Gerling-Konzern Allgemeine Versicherungs-AG ("GKA") and Gerling-Konzern Lebensversicherungs-AG ("GKL"). App., *infra*, 47a. Neither of these German insurers is jurisdictionally present in California. *Id.* Of these two, only GKL (a German life insurer) reportedly has any records surviving from the pre-1945 period. SER 1055-62. Neither of these German insurers is a direct parent or subsidiary of any of the Gerling Petitioners. *Gallagher*, 267 F.3d at 1231; Lodg., *infra*, L-6.

The district court expressly found that none of the Gerling Petitioners "is in possession, custody or control of records pertaining to any insurance policies in force in Europe at any time between 1920 and 1945." App., *infra*, 47a. Moreover, the Gerling Petitioners do not have control over their two German affiliates that issued such policies. While the Gerling Petitioners have requested that those German affiliates provide the

information required by the HVIRA, those companies have declined to do so, citing privacy concerns arising under German law. ER 644, 649, 654, 659, 664, 669. In fact, relevant German governmental authorities have concluded that compliance with the HVIRA's disclosure rules would violate civil and criminal provision of German law. ER 1182, 3131-32.

4. German Data Protection Laws.

The control and dissemination of personal information (including insurance information) in Europe is subject to limitations set forth in the data protection laws of the various European nations. ER 1488-1542. Personal data maintained by German insurers may only be disclosed to third parties in accordance with the requirements of the German Data Protection Act (*Bundesdatenschutzgesetz* ("BDSG")). ER 682, 846.

The BDSG arises out of protections contained in the Constitution (*Grundgesetz*) of the Federal Republic of Germany. *Entscheidungen des Bundesverfassungsgerichts*, Vol. 84 (1992) 197; 85 (1992) 219, at p. 224; 100 (1999) 313, at p. 359 *et. seq.* Under the BDSG, decisions as to the use of personal data must be made by the individuals to whom the data relates. ER 681. The entity holding the personal data (in this case, German insurers) may be subject to civil and criminal penalties as a result of their unauthorized disclosure of such data to third parties. SER 1248.

The privacy protections of the BDSG are simply incompatible with the HVIRA. While the BDSG empowers each individual to determine how his or her personal information is used, the HVIRA requires the wholesale disclosure of all insurance information relating to all insurance policies in force in Europe over a twenty five year span. *Id.*; Cal. Ins. Code § 13804(a). The HVIRA further requires that this information be included in a publicly accessible registry. Cal. Ins. Code § 13803.

The German governmental authorities charged with enforcement of the BDSG have already concluded that compliance with the HVIRA would violate German law and would subject German insurers to criminal and civil penalties. On May 16, 2000, the District Government of Cologne, Germany, concluded "that pursuant to § 28 paragraph 2, No. 1b BDSG, the transmission of data in the form of lists pertaining to all policyholders from 1920-1945 . . . is not permissible." ER 1182.

Following certain amendments to the BDSG, the Ministry of the Interior of North Rhine-Westphalia (Nordhein-Westfalen) also determined that "there still appears to be no legal basis that permits the transfer of all personal insurance data for the policies from the period 1920-1945. The substantive requirements of Section 28 BDSG for the transfer of data . . . continues to be limited to [Holocaust victims.]" ER 3131. In a series of *amicus curiae* briefs filed with the Ninth Circuit in this litigation, the Federal Republic of Germany echoed that conclusion.[7] ER 846; SER 1248; March 15, 2002 *Amicus brf.* of FRG at p. 6; August 5, 2002 *Amicus brf.* of FRG at 9-10.

Privacy laws, such as the BDSG are commonplace in the United States as well. In fact, California has similar privacy requirements concerning insurance policies issued there. *See* Cal. Ins. Code § 791.13; *see also* 15 U.S.C. § 6802(a). Nevertheless, California demands German companies to violate their nation's own laws on this issue.

5. The Decisions Below.

The Gerling Petitioners initiated this litigation against the Commissioner on March 9, 2000, in the U.S. District Court for

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7. These concerns were also expressly recognized and addressed in the recent agreement between ICHEIC, the German Foundation and the German Insurance Association: "[t]he confidentiality of the list of German companies' holocaust era insurance policies will be protected respecting all data protection regulations." Lodg., *infra*, L-161.

the Eastern District of California. ER 1-15. The action was brought pursuant to 42 U.S.C. § 1983 and sought declaratory and injunctive relief based on the alleged unconstitutionality of the HVIRA and certain related California statutes.[8] *Id.* The complaint specifically alleged that these statutes violated various provisions of the U.S. Constitution both facially and as-applied to the Gerling Petitioners. *Id.*

On their motion for preliminary injunction, the district court held that the Gerling Petitioners demonstrated a probability of success on the merits of their claims that the HVIRA facially violated the foreign affairs doctrine and the Commerce Clause. App., *infra*, 138a-139a. The district court entered a preliminary injunction preventing the Act's enforcement. *Id.* at 139a. The Ninth Circuit subsequently reversed the district court's reasoning, holding that the HVIRA was exempt from a Commerce Clause challenge because, on its face, the HVIRA only regulated California insurers and that Congress delegated to the states the power to regulate insurance under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1014. App., *infra*, 84a-85a. In dismissing the facial foreign affairs challenge, the Ninth Circuit further held that *Zschernig*, *supra*, does not govern, that the statute mainly involves foreign commerce and is not directed at a particular country. *Id.* at 100a-101a. The Ninth Circuit did, however, maintain the preliminary injunction to give the district court an opportunity to consider the Gerling Petitioners' due process challenge. *Id.* at 103a.

On remand, the district court granted the Gerling Petitioners' summary judgment motion, holding that the HVIRA violated the Due Process Clause because it mandated the performance of impossible tasks and required automatic license suspension

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8. In June 2000, the district court dismissed, without prejudice, the Gerling Petitioners' claims regarding the constitutionality of the California statutes other than the HVIRA. The district court reasoned that the Gerling Petitioners did not, at the time, have the requisite standing to challenge those related statutes. *See* App., *infra*, 76a-77a.

without providing for a meaningful opportunity to be heard. App., *infra*, 69a. The Ninth Circuit, which declined to adopt the Eleventh Circuit's holding in *Gallagher*, reversed holding that the HVIRA did not regulate extraterritorially. App., *infra*, 10a-13a, 24a. The Ninth Circuit further held that the HVIRA did not, on its face, violate the Due Process Clause because a defense based on lack of control over records would thwart the HVIRA's purposes and that other provisions of California law create a presumption that HVIRA requires the Commissioner to hold a hearing.[9] *Id.*, at 32a, 34a.

REASONS FOR GRANTING THE PETITION

The court of appeals' holdings merit this Court's review because:

First, the Ninth Circuit's holdings create a direct conflict among the circuits that can be effectively resolved by this Court alone. The Eleventh Circuit has previously held that when a statute seeks "the production of information by these Plaintiffs [the Gerling Petitioners] regarding Holocaust-era policies issued outside Florida by German entities having only some corporate affiliation with them and no other contacts to Florida, it violates due process limits on legislative jurisdiction." *Gallagher*, 267 F.3d at 1240; Lodg., *infra*, L-27. Conversely, the Ninth Circuit found constitutional a California statute which calls for the production of the same information from the same entities on an identical factual record. *See* App., *infra*, 10a.

Second, in declining to follow this Court's holding in *Zschernig* with respect to the Gerling Petitioners' facial and

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9. The Ninth Circuit's decision rendered moot a related appeal which the Gerling Petitioners had taken from an order of the district court denying their motion for attorneys' fees pursuant to 42 U.S.C. § 1988. Given the Ninth Circuit's decision, the Gerling Petitioners were no longer deemed "prevailing parties" for purposes of recovering such fees. The Gerling Petitioners reserve their rights to reassert such a claim in the event that this Court ultimately reverses the Ninth Circuit.

as-applied challenges under the foreign affairs doctrine, the Ninth Circuit has permitted California to infringe upon the federal government's exclusive authority over foreign affairs.

I. THE DECISION BELOW CONFLICTS WITH WELL-ESTABLISHED DUE PROCESS PRECEDENT OF THIS COURT AND OF OTHER CIRCUIT COURTS.

The Ninth Circuit decision conflicts with the due process jurisprudence of this Court with respect to an issue of national and international significance. In addition to California and Florida, four states have enacted similar Holocaust-era insurance legislation, while four others have similar legislation pending.[10] Review should be granted to prevent a nationwide irreparable harm that will impact not only the Gerling Petitioners, but significant portions of the insurance industry and the nation's insurance consumers as well.

A. The Decision Is In Direct Conflict With The Eleventh Circuit's Decision In *Gallagher.*

California and Florida have enacted materially identical Holocaust-era insurance reporting statutes. Cal. Ins. Code §§ 13800-13807; Fla Stat. Ann § 626.9543, Lodg., *infra*, L-29-L-33. In practice, the statutes require the Gerling Petitioners to obtain and produce the same records from the same German insurers regarding the same German policies. The sole expressed subject matter of both statutes is the payment of claims arising under Holocaust-era policies. Cal. Ins. Code § 13807; *Gallagher*, 267 F.3d at 1238, Lodg., *infra*, L-25, L-30. Those policies were issued in Europe by German entities having only some tangential

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10. *See* Md. Code Ann., Ins. § 28-105 (2000); Minn. Stat. § 60A.053; N.Y. Ins. Law § 2705 (McKinney 1998); and Wash. Rev. Code § 48.104.060 (2002). *See also* HB 3346, 92nd Gen. Assem., Reg. Sess. (Ill. 2001); S.B. 741, Mass 182nd Gen. Court 2001 Reg. Sess. (Mass. 2001); N.J.S.B. 2128, 2000 Leg., 209th Sess., 2nd. Reg. Sess. (N.J. 2000); and H.B. 6009, 2001-2001 Leg. Sess. (R.I. 2001).

corporate affiliation to the Gerling Petitioners and no other contacts with Florida or California. The Gerling Petitioners do not have care, custody or control over any of the information required by either statute. App., *infra*, 47a; Lodge., *infra*, L-7 .

Faced with those facts, the Eleventh Circuit held that the Florida statute violated the Due Process Clause:

> . . . to the extent the Act calls for the production of information by these Plaintiffs regarding Holocaust-era policies issued outside Florida by German entities having only some corporate affiliation with them and no other contacts to Florida, it violates Due Process limits on legislative jurisdiction.

Gallagher, 267 F.3d at 1240, Lodg., *infra*, L-27. Characterizing the Gerling Petitioners as the "nominally" regulated parties, the Eleventh Circuit found that Florida's:

> reporting provisions pertain to, and as a practical matter unquestionably seek to regulate, a subject matter – the German affiliates' payment or non-payment of Holocaust-era policy claims – with no jurisdictionally-significant relationship to Florida.

Id. at 1238, L-22.

Despite an indistinguishable record, the Ninth Circuit rejected the analysis of the Eleventh Circuit and found that the HVIRA's requirement that the same six companies produce information regarding the same German insurance policies issued outside California by German entities having no direct contacts to California does not violate the Due Process Clause. App., *infra*, 10a-13a, 24a. Given the fact that the Ninth and Eleventh Circuits had before them identical issues, identical parties and an identical factual record, the conflict created by the Ninth Circuit decision can not be more clear.

1. The Ninth Circuit's Purported Distinctions.

Before announcing its disagreement with the Eleventh Circuit, the Ninth Circuit made three attempts to distinguish *Gallagher*. Each of these attempts was contradicted by the record.

First, the Ninth Circuit stated that, in Florida, "information was demanded directly from both local and foreign entities, while here information is sought *only* from the California licensees." App., *infra*, 11a. (Emphasis in original). The Ninth Circuit was mistaken. In fact, only California made direct demands on foreign entities.

In *Gallagher*, the Florida Commissioner issued subpoenas to the Gerling Petitioners seeking information exclusively in the possession of their German affiliates. These subpoenas were served only on the Gerling Petitioners and were enforceable only against the Gerling Petitioners. *Gallagher*, 267 F.3d at 1236, Lodg., *infra*, L-7.

In contrast, California repeatedly demanded information directly from the German affiliates of the Gerling Petitioners. ER 1114-15; SER 1072-89. In March 2000, California Treasurer Philip Angelides issued a written demand to GKL in Germany, that it comply with the HVIRA to "eliminate the need for litigation." He warned GKL that "[t]he absence of compliance exposes [your company] and others to protracted litigation." SER 901-08.

Likewise, at a "pre-enforcement" hearing conducted by the Department of Insurance in 1999, the Department's senior counsel conceded that the HVIRA "clearly goes beyond the California licensed company." ER 1111. The Commissioner made it clear that an officer of Petitioner Gerling America Insurance Company was inadequate to speak to the compliance issue because he did not know what records were maintained by the German entities. *See supra.*

Shortly prior to the enactment of the HVIRA, the Commissioner served on GKA and GKL written interrogatories and conducted a telephone deposition of one of their German corporate officers. SER 1072-89. In short, the direct enforcement efforts undertaken by California with respect to foreign companies far exceeded those undertaken by Florida.

Second, the Ninth Circuit claimed that "the sole purpose of the Florida statute was the payment of Holocaust-era claims and that no other justification for the statute, such as the Florida licensees' fitness to do business, had been properly advanced." App., *infra*, 11a. With respect to the HVIRA, the Ninth Circuit simply ignored its stated legislative purpose of the HVIRA and "construed" it as having other legitimate purposes. *Id.* at 19a.

In fact, the Florida Commissioner did argue that the purpose of the Florida statute was, in part, to "confirm the claims payment practices, solvency, and 'good character' of the Florida insurer." *Gallagher*, 267 F.3d at 1239, Lodg., *infra*, L-24. The Eleventh Circuit found that this explanation was undercut by the Florida legislature's "unequivocal statement of its purpose" – that is, to secure the payment of Holocaust-era claims. *Id.*, Lodg., *infra*, L-25.

In its final attempt to distinguish *Gallagher*, the Ninth Circuit noted that the "only statute at issue in this appeal is a reporting statute." App., *infra*, 12a. That was also true in *Gallagher*. *See* 267 F.3d at 1234, Lodg., *infra*, L-14. ("The only issue before us, and the *only* issue we resolve today, is extremely narrow, and concerns solely the validity of the Act's reporting provisions.")

In sum, there was simply no basis to distinguish the statutory scheme struck down in *Gallagher* from the scheme upheld by the Ninth Circuit here.

2. The Decision Directly Conflicts With This Court's Legislative Due Process Jurisprudence.

The Due Process Clause places limits on the territorial reach of a state's legislative jurisdiction. "[I]f a state has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981) (plurality opinion); *see Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). "Legislative Jurisdiction refers to both the 'lawmaking power of a state' and 'the power of a state to apply its laws **to any given set of facts** . . .'" *Gallagher*, 267 F.3d at 1236, Lodg., *infra*, L-17 (emphasis supplied) (quoting *Adventure Communications v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 435-35 (4th Cir. 1999) (internal citations omitted)).

In *Gallagher*, the Eleventh Circuit faithfully applied this standard:

> The subject of the Florida Legislature's concern in the Holocaust Victims Insurance Act is Holocaust-era insurance policies and the payment of claims still due under those policies. While there may be a connection between the State of Florida and that subject to the extent it relates directly to the activities of Florida insurers, there is virtually *no* connection between the State of Florida and that subject to the extent it concerns insurance transactions involving Plaintiffs' German affiliates that took place years ago in Germany, among German residents, under German law, relating to persons, property, and events in Germany.

267 F.3d at 1238, Lodg., *infra*, L-21. Exactly the same analysis applies here. There is simply no connection between California and insurance transactions that took place years ago in Germany, among German residents, under German law, relating to persons, property and events in Germany. *See id.* California simply cannot

regulate these transactions consistent with the Due Process Clause.

To avoid this flaw, the Ninth Circuit attempted to recast the general limitation on legislative jurisdiction into three specific tests. In the court's new formulation, a challenge on legislative jurisdiction grounds can succeed only if the statute in question (1) regulates out-of-state entities based on incidental in-state conduct, (2) regulates the substance of out-of-state transactions, or (3) taxes in-state entities arising from transactions conducted entirely out of state. App., *infra*, 13a-22a. Nothing in this Court's precedent suggests that these categories are exclusive. In any event, the HVIRA plainly fits within at least two of these three categories.

First, the HVIRA clearly attempts to regulate out-of-state entities on the basis of incidental contacts with the state. The Gerling Petitioners did not write any insurance policies in effect in Europe between 1920 and 1945, and they do not have possession, custody or control over any such policies. App., *infra*, 47a. While the HVIRA nominally requires the Gerling Petitioners to produce information about such policies, the real effect of the HVIRA is to require their German affiliates to produce such information.

Rather than acknowledging that, as a practical matter, the HVIRA requires foreign companies to produce information to the California licensees, the Ninth Circuit claimed that the California licensees could take on the burden by having their employees "travel overseas to examine the documents themselves." App., *infra*, 15a. This "solution" disregards the fact that the Gerling Petitioners and their German affiliates are separate corporate entities. The Ninth Circuit also disregarded the fact that the German government has concluded that the German affiliates can not provide access to this information without subjecting themselves to criminal sanctions. ER 1248, 1182, 3131-32.

The Ninth Circuit further suggested that the California licensees could spare their German affiliates the burden of compliance by "disaffiliating" from them. App., *infra*, 15a. But this "solution" simply represents another form of extraterritorial regulation. The Ninth Circuit has offered the foreign companies a choice: either turn over to your California-licensed affiliates all information regarding these policies, or disaffiliate from those California-licensed companies.

Second, the HVIRA is undeniably part of a legislative scheme designed to regulate the substance of out-of-state transactions. The Ninth Circuit found that the HVIRA merely requires the reporting of information about foreign insurance policies and, accordingly, is not a form of regulation. App., *infra*, 10a. To reach that conclusion, the court had to close its eyes to the fact that the HVIRA was adopted as part of the same legislation (the Knox Bill) which purported to give California courts jurisdiction over claims under Holocaust-era insurance policies, and which extended the long-expired statute of limitations for such claims (Cal. Code Civ. P. § 345.5). Lodg., *infra*, L-36-L-41.

The Due Process Clause prohibits a state from adopting such extraterritorial legislation. This is the teaching of *Home Ins. Co. v. Dick*, 281 U.S. at 407-08, and the Ninth Circuit should have followed it here.

B. The Decision Conflicts With This Court's Precedent Establishing The Requirement Of A "Meaningful Hearing" Prior To License Suspension.

It is well-established precedent of this Court that a party that stands to lose a protected interest (such as a license) is entitled to certain due process safeguards. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1975); *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972); *Bell v. Burson*, 402 U.S. 535, 539 (1971); *see also United States v. Dalton*, 960 F.2d 121 (9th Cir. 1992)

(holding it violative of fundamental fairness to convict defendant for failing to do an act that he was incapable of performing).

Once it is determined that the interest at stake is a protected property interest, the sole question that remains is what process is due. *Logan*, 455 U.S. at 428; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541-42 (1985). The Gerling Petitioners' California licenses are clearly protected by the Due Process Clause. *See Bell*, 402 U.S. at 539. They must, therefore, be afforded a "meaningful" hearing before their licenses are suspended.

The fundamental requirement of a "meaningful hearing" is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews*, 424 U.S. at 333. The ability to present reasons why a proposed action should or should not be taken is to influence the decision maker. "The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Cleveland Bd. of Educ.*, 470 U.S. at 546.

The Gerling Petitioners do not have custody or control of the information sought. App., *infra*, 47a. They do not have the ability to force other companies to violate their own domestic laws to provide this information. *Id.* In order for an HVIRA compliance hearing to be "meaningful," the Gerling Petitioners must be given the opportunity to present these basic defenses.

The outcome of any hearing which may be afforded under the HVIRA is predetermined. The HVIRA provides for automatic license suspension without due process of law. *See* Cal. Ins. Code § 13806. The record is clear that an administrative law judge conducting a hearing regarding HVIRA compliance would not be permitted to exercise any discretion as to whether non-compliance might be excused or justified or mitigated in any way that could affect the outcome of the hearing. ER 1019-20, 1030, 3179. A hearing cannot possibly be "meaningful" if the Gerling Petitioners' only option is to proceed

with a hearing, remain mute, and await the predetermined conclusion to be rendered.[11]

The Ninth Circuit held that since other provisions of California law entitled the Gerling Petitioners to a hearing, the requirements of the Due Process Clause were satisfied. App., *infra*, 34a. In effect, the court dispensed with the requirement that a hearing must be "meaningful" in order to satisfy due process. This conclusion, if left alone, would "allow the State to destroy at will virtually any state-created property interest" (*Logan*, 455 U.S. at 432) and directly conflicts with numerous decisions of this Court and countless circuit courts as well.

C. The Ninth Circuit Erred In Failing To Recognize That It Is Fundamentally Unfair To Punish A Party For Something Wholly Outside Its Control.

This Court has repeatedly recognized that it is fundamentally unfair to punish a party for something that is wholly outside of its control and to which it has no relation. *Societe Internationale v. Rogers*, 357 U.S. 197 (1958); *Maggio v. Zeitz*, 333 U.S. 56, 74 & n.6 (1948). The Ninth Circuit's decision represents a serious departure, not only from this Court's precedent, but from innumerable circuit court decisions as well. *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992); *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 781 & n.8 (9th Cir. 1983) (and cases cited therein); *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1369 (9th Cir. 1980); *Cine Forty-Second St. Theater Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1066 (2d Cir. 1979).

In *Rogers*, 357 U.S. 197 (1958), this Court held that litigants may not be penalized for refusing to violate foreign law.

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11. *See Lee v. State of Rhode Island*, 942 F. Supp. 750, 755 (D.R.I. 1996); *Hayes v. Reed*, 1997 U.S. Dist. LEXIS 2992 (E.D. Pa. Mar. 13, 1997) (where outcome of hearing is predetermined, such hearing is a "sham").

This Court held that even though the plaintiff had control of the documents sought, it should not be penalized for its failure to produce them. Here, the Gerling Petitioners' circumstances are more compelling. Unlike the plaintiffs in *Rogers*, they do not have control of the documents sought under the HVIRA. App., *infra*, 47a. Furthermore, the relevant German authorities have already determined that production of the information sought under the HVIRA would violate German law. ER 1182, 3131-32.

Moreover, where the information could be found from alternative means, there is "little or no reason to require a party to violate foreign law." *Richmark v. Timber Falling Consultants*, 959 F.2d 1468, 1474 (9th Cir. 1999) (citing *In re Sealed Case*, 825 F.2d 494 (D.C. Cir.), *cert. denied*, 484 U.S. 963 (1987)). The German Foundation has recently reached an agreement with ICHEIC addressing, in part, the publication of relevant insurance information. Lodg., *infra*, L-70-L-89. This agreement adopts a procedure which addresses the legitimate data protection concerns of Germany. *Id.* at L-147-L-162. There is simply no reason to interfere with German law when, in fact, relevant information will be made available.

II. THE DECISION BELOW CONFLICTS WITH THE FOREIGN AFFAIRS PRECEDENT OF THIS COURT AND OF OTHER CIRCUITS.

On its face, the HVIRA requires production of information regarding insurance policies sold "to persons in Europe, which were in effect between 1920 and 1945." Cal. Ins. Code § 13804(a). As applied to the Gerling Petitioners, this requirement is limited to policies issued by German insurers to German residents under German law. In its application, the HVIRA interferes with German domestic law on such issues as data protection, currency valuation, insurance regulation and Holocaust reparations and compensation. It was enacted in disregard of protests lodged by the U.S. federal government and it interferes with 55 years of U.S. foreign policy efforts.

A. The Decision Conflicts With This Court's Decision In *Zschernig*.

The Ninth Circuit's ruling departs from this Court's decision in *Zschernig*, *supra*. In *Zschernig*, the Court struck down an Oregon probate law that allowed a foreign citizen to inherit from a decedent's estate only if United States citizens could inherit from a decedent's estate in the foreign citizen's country. 389 U.S. at 431. The Court noted that the statute at issue required state courts to engage in "minute inquiries concerning the actual administration of foreign law" and to judge the credibility and good faith of foreign diplomatic statements. *Id.* at 435.

The Court held that the Oregon statute constituted an impermissible intrusion by the state into the field of foreign affairs, stating that "[t]he statute as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own." *Id.* at 440. The Court further held that a state statute is unconstitutional if it has "more than 'some incidental or indirect effect in foreign countries'" or "great potential for disruption or embarrassment" of American foreign policy. *Id.* at 434-35.

The HVIRA has more than some "incidental or indirect effect in foreign countries" and certainly creates "great potential for disruption or embarrassment" to U.S. foreign policy. In describing the effects of the HVIRA, the United States has stated that the HVIRA's disclosure requirements constitute "not merely a theoretical, but actual interference with the United States' conduct of foreign policy, that undermines the Constitution's exclusive grant to the national government of authority to conduct foreign policy." August 5, 2002 Rehearing *en banc* Amicus brf. of U.S. at 15.

1. The HVIRA Has Direct Effects In Foreign Nations.

The Ninth Circuit erred in failing to acknowledge that the HVIRA has direct effects in foreign countries, particularly in Germany. In fact, aside from the penalty associated with

noncompliance, the HVIRA's effects are exclusively targeted abroad – it only demands information regarding insurance policies sold in Europe. Cal. Ins. Code § 13804(a).

As applied to the Gerling Petitioners, the HVIRA requires companies domiciled in Germany (with no jurisdictional presence in California) (*see* App., *infra*, 47a) to gather and disclose information in direct violation of German data protection laws. ER 1182, 3131-32. The German insurers' refusal to violate their own domestic laws will result in the mandatory suspension of the Gerling Petitioners' California licenses. *See* Cal. Ins. Code § 13806. As such, the HVIRA seeks to trump the law of the Federal Republic of Germany.

The HVIRA further interferes with German domestic law by redefining the value of German insurance policies by eliminating "diminution for wartime or immediate postwar currency devaluation." Cal. Ins. Code § 13802(c). Through this new definition, California is attempting to "legislate away" the historical fact of post-War currency devaluation in Germany.[12]

The HVIRA calls into question 50 years of domestic German reparations and compensation efforts. The gathering and publication of information under the HVIRA is intended to "facilitate the resolution" of European insurance claims pursuant to California-imposed standards, in contravention to German reparations laws. Cal. Ins. Code § 13801. Not surprisingly, the Federal Republic of Germany has characterized the HVIRA as an "affront to [its] sovereignty." July 27, 2001 FRG A*micus* brf. in support of Petition of Writ of Certiorari.

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12. At the conclusion of Word War II, the German currency (the *Reichsmark*) was essentially rendered worthless. In 1948, it was replaced by the *Deutschmark* at a conversion rate of 10 to 1. All German financial obligations (including the value of insurance policies) were adjusted accordingly. SER 1249.

2. The HVIRA Poses Great Potential For Disruption Or Embarrassment to U.S. Foreign Policy.

Holocaust reparations has been an important concern of U.S. foreign policy since the conclusion of the Second World War. Most recently, U.S. foreign policy efforts have resulted in the Executive Agreement. SER 1447-53; ER 818-37. The goal of the Executive Agreement is to provide a remedy for Holocaust-era claims so that "German companies" can have a measure of "all embracing and enduring legal peace." ER 1449.

The Gerling Petitioners fall within the definition of "German companies" under the Executive Agreement and have participated in the funding of the Foundation. *See* Lodg., *infra*, L-44. The HVIRA, however, does not permit them to enjoy the "legal peace" contemplated by the Agreement.

The HVIRA's demand for "information from European companies on activities that took place in Europe more than 50 years ago, under the threat of sanctions, have been described as *contrary to longstanding U.S. policy* that matters of Holocaust-era restitution and compensation should be resolved through negotiation, cooperation and dialogue." Lodg., *infra*, L-65-L-69, Ambassador Randolph M. Bell, Special Envoy for Holocaust issues, at a Congressional hearing held on September 24, 2002.

The HVIRA clearly creates "great potential for disruption or embarrassment" to U.S. foreign policy. *Zschernig*, 389 U.S. at 435. It has resulted in protests from some of this nation's closest allies. ER 1211-31, 1311-23. Under this Court's precedent in *Zschernig*, the HVIRA simply cannot stand.

B. The Decision Also Conflicts With The First Circuit's Decision In *Natsios*.

The Ninth Circuit's decision also conflicts with the First Circuit's decision in *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd other grounds*, 530 U.S. 363

(2000). In *Nátsios*, the First Circuit held that a Massachusetts statute which banned state businesses from trading with companies that conduct business in Burma was unconstitutional under *Zschernig*.

The First Circuit held that the Massachusetts law had more than an indirect or incidental effect on foreign relations and found the following factors relevant: (1) the design and intent of the law was to affect the affairs of a foreign country; (2) Massachusetts, with its staggering annual purchasing power, was in a position to design and effectuate that design and intent; (3) the effects of the law could be magnified should Massachusetts prove to be a "bellwether" for other states; (4) the law resulted in serious protests from other countries; and (5) Massachusetts had chosen a course divergent from the federal law, thus raising the prospect of embarrassment for the U.S. *Natsios*, 181 F.3d at 53.

Application of these factors should have led to the same result here. *First*, the design and intent of the HVIRA is to affect affairs in a foreign country. To this end, the HVIRA is intended to facilitate the resolution of Holocaust-era claims and to force European insurers to pay claims. Further, it forces companies in Europe to take affirmative acts in direct contravention of their own domestic laws. *Second*, California, as the largest insurance market in the United States, is clearly in a position to effectuate the design and legislatively declared intent of the HVIRA. ER 223, 908, 1063. *Third*, the effects of the HVIRA will be magnified should California prove to be a "bellwether for other states." In fact, at least ten states are considering passage or have already passed similar statutes. *See* n.10, *supra*.

Fourth, the HVIRA has resulted in repeated protests from the Federal Republic of Germany, Switzerland and the United States. The German government has specifically stated that the HVIRA has an "adverse impact" on Germany's sovereign interests and its "foreign relations with the United States. . . ." August 9, 2002, FRG Rehearing *en banc Amicus* Brf. at 1.

Finally, the "course" chosen by California diverges from the Executive Agreement and the assurances made therein, "thus raising the prospect for embarrassment." The Ninth Circuit's decision squarely conflicts with the First Circuit's decision in *Natsios*, and therefore, review by this Court is warranted.

C. The HVIRA Interferes With Other U.S. Foreign Policy Initiatives.

The HVIRA also interferes with other U.S. international obligations in its potential impact on the implementation of the *General Agreement on Trade in Services* ("GATS"), Apr. 15, 1994, 33 I.L.M. 1125, to which both the U.S. and Germany are signatories. *See* 19 U.S.C. § 3511 (West 2002); 33 I.L.M 1125, 1131. In the GATS, Congress and the Executive Branch "recognize the contribution that liberal trading policies can make to the healthy growth and development of [the U.S. economy] and of the world economy as a whole." *Declaration on the Contribution of the World Trade Organization to Achieve Great Coherence in Global Economic Policymaking*, 33 I.L.M. at 1249. GATS "is the first multilateral, legally enforceable agreement covering trade and investment in the services sector," and serves as a mechanism to, in part, remove trade barriers and create open access to the world's insurance markets. *U.S.T.R. Statement of Administrative Action*, 1994 WL 761795; *Annex on Financial Services*, 33 I.L.M. at 1190.

GATS attempts to tear down trade barriers by granting "Most Favoured-Nation" ("MFN") treatment to its members. That is, each member grants to the other members' businesses "treatment no less favorable than that it accords to like services and service suppliers of any other country." *GATS*, part I, art. I(3)(a), 33 I.L.M. 1125, 1169. In its application, however, the HVIRA potentially interferes with U.S. fulfillment of its obligations under GATS by effectively closing California to German and other European insurers.

The U.S. has committed, under the GATS Fifth Protocol, to permit open access to the U.S. insurance markets subject to specific limitations. *See* World Trade Organization -Status of the Fifth Protocol, available at *http://www.wto.org/english/tratop_e/serv_e/finance_e/finance_status_5prot_e.htm.* The U.S. expressly preserved various state laws as exceptions to the GATS. The HVIRA was not among the state laws preserved. *See* World Trade Organization-Financial Services Commitments and MFN Exemptions, available at *http://www.wto.org/english/ tratop_e/serv_e /finance_e/finance_commitments_e.htm.*

The United States has previously threatened to enforce the rights conferred by GATS against Japan to ensure U.S. insurance providers full access to the Japanese insurance market. U.S.T.R Press Release 99-12, available at *http://www.ustr.gov/releases/1999/02/99-12.pdf.* Those threats now ring hollow as the HVIRA effectively closes the world's seventh largest insurance market to European insurers. ER 223, 908. The HVIRA creates "great potential for disruption or embarrassment" of U.S. foreign policy in this important area. *Zschernig*, 389 U.S. at 435. Review by this Court is clearly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — AMENDED OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED JULY 15, 2002, AMENDED SEPTEMBER 9, 2002

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 01-17023
01-17433
02-15282

D.C. No.
CV-00-00506-WBS

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. — U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL LIFE INSURANCE COMPANY; GERLING AMERICA INSURANCE COMPANY; and CONSTITUTION INSURANCE CORP.,

Plaintiffs-Appellees-Cross-Appellants-Plaintiffs-Appellants,

v.

HARRY W. LOW, in his capacity as the COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA,

Defendant-Appellant-Cross-Appellee-Defendant-Appellee.

Appendix A

D.C. No.
CV-00-00875-WBS

ASSICURAZIONI GENERALI,

Plaintiff-Appellee-Cross-Appellant-Plaintiff-Appellant,

v.

HARRY W. LOW, individually, and in his capacity as the INSURANCE COMMISSIONER for the STATE OF CALIFORNIA,

Defendant-Appellant-Cross-Appellee-Defendant-Appellee.

D.C. No.
CV-00-00779-WBS

WINTERTHUR INTERNATIONAL AMERICA INSURANCE COMPANY, WINTERTHUR INTERNATIONAL AMERICA UNDERWRITERS INSURANCE COMPANY; GENERAL CASUALTY COMPANY OF WISCONSIN; REGENT INSURANCE COMPANY; REPUBLIC INSURANCE COMPANY; SOUTHERN INSURANCE COMPANY, UNIGARD INDEMNITY COMPANY; UNIGARD INSURANCE COMPANY; and BLUE RIDGE INSURANCE COMPANY,

Plaintiffs-Appellees-Cross-Appellants-Plaintiffs-Appellants,

v.

Appendix A

HARRY W. LOW, in his capacity as INSURANCE COMMISSIONER for the STATE OF CALIFORNIA,

Defendant-Appellant-Cross-Appellee-Defendant-Appellee.

D.C. No.
CV-00-00613-WBS

AMERICAN INSURANCE ASSOCIATION and AMERICAN RE-INSURANCE COMPANY,

Plaintiffs-Appellees-Cross-Appellants-Plaintiffs-Appellants,

v.

HARRY W. LOW, in his capacity as INSURANCE COMMISSIONER for the STATE OF CALIFORNIA,

Defendant-Appellant-Cross-Appellee-Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted
May 8, 2002—Pasadena, California

Filed July 15, 2002
Amended September 9, 2002

Appendix A

Before: Alfred T. Goodwin, Susan P. Graber, and Richard A. Paez, Circuit Judges.

Opinion by Judge Graber

OPINION

GRABER, Circuit Judge.

This case comes before us for the second time. Plaintiffs, which are various insurance companies and a trade association of insurance companies, brought the present action to enjoin Defendant Harry W. Low, the Insurance Commissioner of the State of California (Commissioner), from enforcing a California statute requiring disclosure of information about Holocaust-era insurance policies. The district court permanently enjoined enforcement of the statute. The main question for decision is this: May California constitutionally require the disclosure of insurance claims-related information by an insurance company that is licensed to do business in California even though the required information may be in the hands of a related entity that is located in a foreign country? We answer that question "yes" and, accordingly, reverse the judgment of the district court and vacate the injunction.

FACTUAL AND PROCEDURAL HISTORY

The Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807 (HVIRA), requires any insurer doing business in California that sold insurance policies to persons in Europe that were in effect between

the years 1920 and 1945 (Holocaust-era policies) to file certain information about those policies with the Commissioner.[1] Cal. Ins. Code § 13804(a). The reporting requirement also applies to insurance companies that do business in California and are "related" to a company that sold Holocaust-era policies, even if the relationship arose after the policies were issued. *Id.* A "related company" is defined as any "parent, subsidiary, reinsurer,[2] successor in interest, managing general agent, or affiliate company of the insurer." *Id.* § 13802(b). The statute instructs the Commissioner to store the information in a "Holocaust Era Insurance Registry," which is to be made available to the public. *Id.* § 13803. The Commissioner "shall suspend the certificate of authority to conduct insurance business

1. The information that the insurance companies must provide is: (1) the number of Holocaust-era insurance policies; (2) the holder, beneficiary, and current status of each policy; and (3) the city of origin, domicile, or address for each policyholder listed in the policies. Cal. Ins. Code § 13804(a)(1)-(3). In addition, the insurer must certify that: (1) the proceeds of the policies were paid; or (2) the beneficiaries or heirs could not, after diligent search, be located, and the proceeds were distributed to Holocaust survivors or charities; or (3) a court of law has certified a plan for the distribution of the proceeds; or (4) the proceeds have not been distributed. The implementing regulations state that, if "the insurer states that it has no actual policies to report because the records are no longer in the possession of the insurer or its related company(ies), it shall provide a complete explanation of that statement." Cal. Code Regs. tit. 10, § 2278.2(a). Any insurer who knowingly files false information is subject to a penalty not to exceed $5,000. Cal. Ins. Code § 13805.

2. By regulation, the meaning of "reinsurer" is limited to directly related companies. Cal. Code Regs. tit. 10, § 2278.1(i).

in the state of any insurer that fails to comply" with the reporting requirements, until the insurer complies. *Id.* § 13806.

Plaintiffs filed four separate actions in which they sought to enjoin the enforcement of HVIRA. The original complaints were filed by

> (1) Gerling Global Reinsurance Corp. of America and its affiliates (collectively, Gerling), who are, according to their complaint, "arguably 'affiliated' [with] . . . or 'related [to]' " two German insurers that issued Holocaust-era policies; (2) American Insurance Association (AIA), a nonprofit trade association of insurers whose member-insurers are required to report under HVIRA, and American Reinsurance Company, a wholly owned subsidiary of a German corporation "that has investment interests in European insurance companies that do issue insurance policies"; (3) Winterthur International America Insurance Company, its affiliates, and numerous other insurance and underwriting companies (collectively, Winterthur), who are "arguably 'related companies' . . . with more than forty insurance companies currently located in Europe"; and (4) Assicurazioni Generali (Generali), an Italian insurance company that issued Holocaust-era policies and currently does business in California.

Appendix A

Gerling Global Reins. Corp. of Am. v. Low, 240 F.3d 739, 742 (9th Cir. 2001) (*Gerling I*), *cert. dismissed,* 122 S. Ct. 1907 (2002).

Plaintiffs sought declaratory and injunctive relief, claiming that HVIRA violated a number of constitutional provisions. Additionally, Plaintiff Gerling asked the court to review two statutes that were enacted at the same time as HVIRA: (1) California Code of Civil Procedure § 354.5, which allows California residents to bring claims for the payment of Holocaust-era insurance policies and extends the statute of limitations on such claims until December 31, 2010; and (2) California Insurance Code § 790.15, which instructs the Commissioner to suspend the certificate of authority of any insurer who has failed to pay on valid Holocaust-era policies. The Commissioner, in his motion to dismiss, argued that Gerling did not have standing to challenge these two additional statutes. The district court granted the motion to dismiss the additional challenges because Gerling had not established an imminent threat of prosecution. Gerling did not appeal that ruling. *Gerling I,* 240 F.3d at 742-43.

The district court issued an order granting Plaintiffs' motions for preliminary injunction and enjoined enforcement of HVIRA and its implementing regulations pending the entry of final judgments. The court based its preliminary injunction on a determination that Plaintiffs had established that (1) they probably would succeed under the foreign affairs doctrine and the Commerce Clause, and (2) enforcement of the statute would cause Plaintiffs irreparable harm. The district court did not reach Plaintiffs' other constitutional challenges to the statute.

The Commissioner appealed the district court's decision. We rejected Plaintiffs' Commerce Clause and foreign affairs doctrine challenges to the statute as a matter of law. *Id.* at 743, 751. However, we left the preliminary injunction in place "in order to give the district court an opportunity to consider whether Plaintiffs are likely to succeed on the merits" of their due process claims. *Id.* at 754.

On remand, the district court conducted further proceedings and ultimately held that the statute violates Plaintiffs' right to procedural due process by "mandating license suspension for non-performance of what may be impossible tasks without allowing for a meaningful hearing." *Gerling Global Reins. Corp. of Am. v. Low,* 186 F. Supp. 2d 1099, 1113 (E.D. Cal. 2001) (*Gerling II*). The court granted Plaintiffs' summary judgment motion, denied the Commissioner's summary judgment motion, and permanently enjoined the Commissioner from enforcing the statute. *Id.* The Commissioner filed a timely notice of appeal. Plaintiffs timely cross-appealed the district court's denial of their alternative grounds for summary judgment.

Plaintiffs moved for a determination that they were entitled to attorney fees as prevailing parties under 42 U.S.C. §§ 1983, 1988. The district court denied their motion, and Plaintiffs timely appealed that decision as well.

Appendix A

STANDARD OF REVIEW

We review de novo the district court's grant or denial of summary judgment. *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1164 (9th Cir. 2000). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact and whether the district court properly applied the relevant substantive law. *Id.* We also review de novo the constitutionality of a statute. *Dittman v. California,* 191 F.3d 1020, 1024-25 (9th Cir. 1999).

LEGISLATIVE JURISDICTION

Key to Plaintiffs' position in this appeal is the assertion that the California legislature exceeded its legislative authority and, by doing so, violated Plaintiffs' due process rights. Specifically, Plaintiffs argue that HVIRA regulates extraterritorially, that is, imposes requirements on entities that are located outside California's borders and alters the substance of insurance contracts executed outside the state. We are not persuaded.

We begin from the premise that a state legislature possesses nearly plenary power to regulate state-licensed businesses and to seek information from entities that are licensed to do business within that state. "The wisdom of [a licensing disclosure] requirement is not for us to judge. For in the end, 'it is for the legislature, not the courts, to balance the advantages and disadvantages of . . . new requirement[s].' " *Dittman,* 191 F.3d at 1032 (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-

88 (1955)) (second alteration in original). Further, we "will not presume that information sought by state officials for which there is a legitimate purpose will be put to an unconstitutional use." *Lewis v. Younger,* 653 F.2d 1258, 1260 (9th Cir. 1980).

We next emphasize what HVIRA does and does not do. We already have cautioned that Plaintiffs' argument that HVIRA "attempts to regulate the decision making authority of European insurance companies to pay or not to pay claims on European policies . . . mischaracterizes HVIRA as a matter of law." *Gerling I,* 240 F.3d at 745 (internal quotation marks omitted). We have explained that HVIRA is a reporting statute which, "by its terms, does not regulate 'the decision making authority of European insurance companies to pay or not to pay claims on European policies' in any way." *Id.* (internal quotation marks omitted). Further, we have held that the statute "is a California insurance regulation of California insurance companies" that "requires California companies only to *provide information* about Holocaust-era insurance policies that they (or any of their affiliates) issued." *Id.* at 746, 745; *see id.* at 745 (distinguishing HVIRA from "state laws [that] sought to regulate directly the conduct of an insurer in another jurisdiction. By contrast, HVIRA seeks only to obtain information about conduct in another jurisdiction, without affecting directly any of that conduct").

Plaintiffs rely heavily on *Gerling Global Reinsurance Corp. of America v. Gallagher,* 267 F.3d 1228 (11th Cir. 2001), in which the Eleventh Circuit held that a Florida statute similar to HVIRA violated due process because it was enacted in excess of the state's legislative jurisdiction. We find that case uninstructive in analyzing the reach of HVIRA, for two reasons.

First, *Gallagher* is materially distinguishable. In *Gallagher,* information was demanded directly from both local and foreign entities,[3] while here information is sought *only* from the California licensees.

Further, the *Gallagher* court held that the sole purpose of the Florida statute was the payment of Holocaust-era claims and that no other justification for the statute, such as the Florida licensees' fitness to do business, had been properly advanced. *Id.* at 1239-40. By contrast, we construe HVIRA to have several legitimate purposes.[4]

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3. Florida's insurance commissioner issued subpoenas addressed to Florida-licensed insurers *and their foreign affiliates,* demanding disclosure of a wide range of documents. *Gallagher,* 267 F.3d at 1231.

4. The Eleventh Circuit acknowledged the importance to its analysis of the Florida statute's purpose:

> We do not mean to say that the Commissioner is necessarily without authority to investigate and obtain records regarding the practices of affiliates of Florida insurers. On the contrary, separate provisions of the Florida Insurance Code may well give the Commissioner authority to conduct far-reaching inquiries into the affairs of a Florida insurer's affiliates in order to determine whether the Florida insurer is fit to do business in the state. . . .
>
> We offer no view as to whether these provisions (which the Commissioner does not even invoke) might have authorized the subpoenas served by the Commissioner in this case; nor do we offer any view

(Cont'd)

Additionally, as we have noted, the only statute at issue in this appeal is a reporting statute. Proposed challenges to other laws that alter the statute of limitations and provide a forum for substantive claims were dismissed for lack of standing. By contrast, the statute considered in *Gallagher* contained both disclosure and substantive elements. *See id.* at 1229, 1239. Although the Eleventh Circuit based its ruling on only the disclosure provisions, *id.* at 1234, the difference in the structure of the two statutes still is meaningful. The California legislature already made the policy judgment that the reporting requirement is severable and has independent force. Thus we need not guess whether the reporting requirement is merely ancillary to substantive regulations directly affecting out-of-state entities and transactions. *Cf. id.* at 1239 ("[T]he Legislature's inclusion of the claims recovery provisions in the same statute *itself* belies any suggestion that the reporting provisions are really intended to protect ordinary policyholders by monitoring the exposure and financial sufficiency of Florida insurers.").

(Cont'd)

> regarding the constitutionality of invoking those provisions in this context. Certainly these provisions fit more closely with the purpose *now* asserted by the Commissioner, and that fact may well affect the Due Process analysis. But the critical point is that *these* subpoenas were issued in furtherance of an investigation under the Holocaust Victims Insurance Act, and *that* Act is not concerned with the financial stability or fitness of insurers doing business in Florida. . . .

Gallagher, 267 F.3d at 1240.

The second reason why we decline to adopt the reasoning of *Gallagher* is that it offers an interpretation of the legislative jurisdiction doctrine that conflicts with the relevant precedents, at least insofar as a statute like HVIRA is concerned. The legislative jurisdiction cases appear to fall into three different categories, each proscribing a certain type of legislative enactment, and HVIRA falls into none of them. We will discuss these three categories in turn.

A. *Regulation of Out-of-State Entities on the Basis of Incidental In-State Contacts*

Several cases have held that the legislative jurisdiction doctrine bars states from directly regulating out-of-state entities unless those entities and their regulated activities have minimum contacts with the state. The analysis in these cases often parallels the analysis of whether the state would have personal jurisdiction over a party in the context of a judicial proceeding.

Thus, for instance, in *Adventure Communications, Inc. v. Kentucky Registry of Election Finance*, 191 F.3d 429, 432 (4th Cir. 1999), the Fourth Circuit applied the legislative jurisdiction doctrine to a Kentucky statute regulating out-of-state television and radio broadcasters who sold advertising time to Kentucky gubernatorial candidates. Finding that the requisite minimum contacts existed between the state, the broadcasters, and their campaign-advertising practices, the court held that Kentucky's statute did not violate due process. *Id.* at 437-38.

Similarly, in *American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County,* 221 F.3d 1211, 1213 (11th Cir. 2000) (per curiam), the Eleventh Circuit applied the legislative jurisdiction doctrine to a county ordinance requiring persons, wherever located, who solicited charitable contributions within the county to register with the county before performing services for their clients. The ordinance also placed limitations on the ability of outside solicitors and consultants to raise funds in the county for organizations that had not themselves registered. *Id.* The court, finding that it had insufficient facts with which to perform the "minimum contacts" analysis, remanded the case to the district court for further development of the record. *Id.* at 1215-16.

Finally, in *Quill Corp. v. North Dakota,* 504 U.S. 298, 301-02 (1992), the Supreme Court considered the validity of a use tax imposed by North Dakota on out-of-state mail-order vendors who sold goods to North Dakota residents for consumption within the state. The Court found that the requisite minimum contacts existed between the state and the regulated vendors, so that the statute did not exceed North Dakota's legislative jurisdiction. *Id.* at 308.

As we have explained previously, HVIRA cannot properly be regarded as a statute that directly regulates foreign insurance companies. Although Plaintiffs complain that the practical effect of the statute is to force foreign companies to search through their records and compile the requested information, this characterization ignores a number of relevant facts. HVIRA places no *direct* demands on these foreign entities and does not impose any sanctions on *them*

for noncompliance.[5] Thus, both the demands and the sanctions of the statute fall solely on California insurers. Should the foreign company desire not to help a California affiliate comply with HVIRA, it need not do so. In fact, Plaintiffs themselves highlight this feature of the statute when they argue that they cannot comply due to their lack of "control" over the requested information.

Additionally, California insurers can comply with the statute even in the absence of assistance from foreign affiliates, in at least two ways: The California insurer's employees could travel overseas to examine the documents themselves, or the California insurer could disaffiliate and thus shed any reporting requirement. Either way, foreign insurers would bear no burden resulting from their affiliates' compliance with HVIRA.

In summary, the statutes at issue in *Adventure Communications, American Charities,* and *Quill Corp.* are distinguishable from HVIRA because they directly regulated

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5. The Gerling and Winterthur Plaintiffs point to letters sent by the California State Treasurer to Plaintiffs' foreign affiliates, urging the companies to help their California affiliates comply with HVIRA. However, these letters were requests, not demands, and carried with them no threat of direct sanctions. Foreign affiliates were and are free to ignore these entreaties. Accordingly, these letters cannot be characterized as a form of direct regulation imposed on foreign insurers.

Moreover, even if these letters were improper, they do not make the statute unconstitutional on its face. HVIRA places no demands directly on foreign insurers; if the Commissioner or other state officials erroneously do so, they do not alter the statute.

out-of-state businesses. By contrast, HVIRA directly regulates the behavior of only California insurers.

B. *Regulation of the Substance of Out-of-State Transactions*

A second line of cases addresses the extent to which a state may regulate, and thereby alter, the *substance* of a transaction executed outside the state and having few in-state consequences. These cases proceed from an analogy based on the "choice-of-law" principle, that is, whether a state has sufficient contacts with the parties and the transaction to apply its substantive law to affect the nature of the transaction. *See, e.g., Allstate Ins. Co. v. Hague,* 449 U.S. 302, 308 (1981).

Thus, in *Home Insurance Co. v. Dick,* 281 U.S. 397, 403-04 (1930), the Supreme Court considered whether a Texas insurance statute could apply in the context of litigation over an insurance policy that had been issued in Mexico, by a Mexican insurer, to a Mexican citizen, covering losses occurring in Mexican waters. The statute, had it applied, would have invalidated an essential substantive term in the insurance policy that was legal in Mexico. *Id.* at 404-05; *id.* at 407 ("As construed, it also directs the disregard in Texas of contractual rights and obligations wherever created and assumed; and it commands the enforcement of obligations in excess of those contracted for."). The Court held that the statute, as applied, violated due process because there were insufficient contacts between Texas and the insurance policy that the statute served to alter: "Texas was therefore without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize

property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law." *Id.* at 408.

Similarly, in *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 67-70 (1954), the Supreme Court applied the legislative jurisdiction doctrine to a Louisiana insurance statute that purported to void certain provisions in insurance contracts entered into outside Louisiana. Likewise, in *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149 (1934), the Court refused to enforce a Mississippi statute that altered the terms of an out-of-state contract for a fidelity bond. The Court held:

> The Mississippi statutes, so construed, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory; but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen.
>
> . . . A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum regardless of the

> relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment.

Id. at 149-50 (citations omitted).

More recently, in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 799 (1985), the Supreme Court examined whether a Kansas court could apply Kansas law to a class action involving plaintiffs from all 50 states who were seeking to recover royalty payments with respect to lands leased by Phillips Petroleum in 11 states. Highlighting the substantive differences between the laws of Kansas and the laws of the states where the lands were leased, the Court held that Kansas lacked sufficient contacts with the out-of-state transactions to apply Kansas law. *Id.* at 816-17, 821.

HVIRA's reporting provisions do not seek to regulate the substance of out-of-state transactions. The statute does not require insurers to pay any claims or otherwise alter the terms of Holocaust-era insurance policies.[6] To the contrary, HVIRA requires California insurers only *to disclose information about* their foreign transactions or those of their affiliates. A request for information is simply not equivalent

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6. Plaintiffs contend that HVIRA's definition of "proceeds," Cal. Ins. Code § 13802(c), rewrites the terms of the foreign insurance policies because the parties to the insurance contracts never contemplated or bargained for such a definition. However, this definition of "proceeds" is *for reporting purposes only* and does not alter the substantive terms of, or obligations arising under, any insurance policy.

to a direct regulation of out-of-state transactions. Thus, cases such as *Hague, Dick, Watson, Hartford,* and *Phillips* are inapposite because HVIRA does not change the terms or enforceability of the insurance policies issued by Plaintiffs or their foreign affiliates.

Plaintiffs counter by asserting that the express purpose of HVIRA is to force California-licensed insurers and their foreign affiliates to pay any outstanding Holocaust-era claims long after the statute of limitations for such claims has run. However, this assertion ignores the fact that the statute has several other purposes as well. As we said in our previous opinion, it "also is likely that California's legislature simply intended to protect its residents from insurance companies that have not paid valid insurance claims." *Gerling I,* 240 F.3d at 745. Further, the Commissioner has propounded other legitimate purposes for the statute, such as informing California residents about potentially valid claims and about the character of the family of companies with whom they might contract for insurance.

Plaintiffs point to two other California statutes that, they contend, *do* seek to regulate the substance of foreign transactions. California Code of Civil Procedure § 354.5 allows California residents to bring claims for the payment of Holocaust-era insurance policies and extends the statute of limitations on such claims until December 31, 2010. California Insurance Code § 790.15 requires the Commissioner to suspend the certificate of authority of any insurer who has failed to pay claims on valid Holocaust-era policies. It may well be that these statutes were enacted in excess of California's legislative jurisdiction. However, we reiterate

that these separately enacted provisions are not before us.[7] Because HVIRA does not change any obligation of any party to a foreign insurance contract, it is distinguishable from the precedents examined in this section.

C. *Taxation of In-State Entities Arising From Transactions Conducted Entirely Out-of-State*

In the third category of precedents on which Plaintiffs rely, the Supreme Court has applied a due process analysis to state statutes taxing out-of-state insurance transactions. Under these cases, a statute may exceed a state's legislative jurisdiction if it taxes a foreign insurer disproportionately to its activities in the taxing state, even if the taxing statute does not change the substantive terms of any foreign insurance policy.

In *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77, 79 (1938), the Supreme Court invalidated a California statute taxing California-licensed insurers' receipt of premiums on reinsurance held by other California insurers. The reinsurance contracts that the state sought to tax were executed in Connecticut, where the premiums were paid and the losses, if any, were payable. *Id.* The Court found that California did not have a sufficient connection to the insurance policies to tax them because "[n]o act in the course of their formation, performance or discharge, took place" in the state. *Id.* at 81. Accordingly, the Court held that the statute violated due process: "The tax cannot be sustained

7. In *Gerling I*, the district court held that Plaintiffs did not have standing to challenge these provisions, and Plaintiffs did not appeal this aspect of the court's decision. 240 F.3d at 742-43.

either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state." *Id.* at 82.

Similarly, in *American Oil Co. v. Neill,* 380 U.S. 451, 452 (1965), the Court employed a due process analysis to invalidate an Idaho tax on a state-licensed dealer in motor fuels that had sold a large amount of fuel through a series of out-of-state transactions. The Court held that the state could not constitutionally tax the extraterritorial sales because they were insufficiently related to the dealer's activities within Idaho. *Id.* at 457-58. The Court reaffirmed the principle that "there must be some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Id.* at 458 (citation and internal quotation marks omitted).

Plaintiffs argue that *Connecticut General* and *Neill* are indistinguishable from the case before us. They note that HVIRA requires California insurers to expend resources in order to disclose information about transactions that were entered into and performed (or not performed) entirely outside the state. Thus, they argue that HVIRA, like the statutory provisions analyzed in *Connecticut General* and *Neill,* imposes financial consequences on in-state insurance companies based on those companies' out-of-state activities.[8]

8. Notwithstanding the Commissioner's argument to the contrary, later decisions of the Supreme Court have not eviscerated *Connecticut General* and *Neill.* Cases such as *ASARCO Inc. v. Idaho State Tax Commission,* 458 U.S. 307 (1982), and *Allied-Signal, Inc. v. Director, Division of Taxation,* 504 U.S. 768 (1992), can be read (Cont'd)

Appendix A

HVIRA is distinguishable from the statutes analyzed in *Connecticut General* and *Neill* because the only regulation that it imposes on Plaintiffs is a duty to disclose information, rather than to pay money to the regulating state. A state's taxing the extraterritorial transactions of in-state insurance companies (thus gaining financially from a multi-jurisdictional entity's revenues) and a state's asking for information about those same transactions are qualitatively different requirements. The former is a form of direct regulation of the out-of-state transaction, and collects money on behalf of the state itself, while the latter is simply a means for the state to assure the corporate good character and financial viability of companies doing business within the state. Plaintiffs' argument proves too much, because nearly every regulatory, record-keeping, and reporting statute requires a regulated entity doing business in more than one jurisdiction to expend resources to comply. Thus, we draw a bright line between obtaining information and obtaining tax revenues, just as we drew a bright line between obtaining information and substantively regulating the topics contained in the informational reports.[9]

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as requiring the taxing state to have minimum contacts with the transaction to be taxed. *ASARCO,* 458 U.S. at 315, 327-29 (citing *Connecticut General*); *Allied Signal,* 504 U.S. at 778 ("Although our modern due process jurisprudence rejects a rigid, formalistic definition of minimum connection, we have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax.").

9. We also question the force of authorities such as *Connecticut General* and *Neill* outside the context of taxation. We already have
(Cont'd)

D. *Conclusion*

Were we to hold that a state may require companies operating within the state to *report* on only those out-of-state activities with which the state can claim minimum contacts, our logic would invalidate many existing reporting statutes.[10] State statutes and regulations routinely require multinational insurance companies, banks, and the like to disclose foreign activities and transactions engaged in by them and their parent and affiliate companies. Under Plaintiffs' strict conception of the legislative jurisdiction doctrine, states would be prohibited from requesting information about potentially fraudulent conduct committed by a local company's European parent simply because the "subject matter" of that conduct was a foreign transaction among foreign nationals. The

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acknowledged that cases defining the outer limits of a state's power to tax are not always readily transferable to other contexts. *See, e.g., Atonio v. Wards Cove Packing Co.*, 10 F.3d 1485, 1495 n.8 (9th Cir.1993) (finding inapplicable "the line of cases . . . in which the Supreme Court has struck down discriminatory state tax provisions for lack of a rational basis" because "state tax cases may genuinely be viewed as *sui generis;* it is an area where the Supreme Court has remained active long after ceasing to invalidate other economic legislation on equal protection grounds").

10. Examples of statutes that could be constitutionally problematic under Plaintiffs' proposed analysis include: California Insurance Code § 699.5 (foreign subsidies); *id.* § 717 (qualifications for certificate of authority); *id.* §§ 1215-1215.16 (Insurance Holding Company System Regulatory Act); California Financial Code §§ 5800-5811 (savings and loan holding companies); *id.* §§ 10000-10009 (foreign savings companies).

Supreme Court cases do not contemplate the use of the legislative jurisdiction doctrine to eviscerate state regulatory power so completely.

In conclusion, the legislative jurisdiction analysis is inapplicable to HVIRA, because it does nothing more than seek information from California-licensed insurers. Therefore, the Commissioner need not prove that minimum contacts exist between California, Plaintiffs' foreign affiliates, and the Holocaust-era policies issued by them. Instead, the state's power to enact and enforce HVIRA is bounded only by *other* constitutional protections. It is to an analysis of these other protections that we now turn.

SUBSTANTIVE AND PROCEDURAL DUE PROCESS

The district court held that HVIRA violates procedural due process by "mandating license suspension for non-performance of what may be impossible tasks without allowing for a meaningful hearing." *Gerling II,* 186 F. Supp. 2d at 1113. In the district court's view, the statute is unconstitutional because it does not allow a hearings officer to consider any excuse for noncompliance, even when an insurer can prove that it lacks control over the information requested or that disclosure of the information would violate foreign law. *Id.* at 1111. This aspect of the district court's decision is legally flawed because it conflates the analytically distinct concepts of procedural and substantive due process.

Regulated parties generally have a right to a meaningful hearing only with respect to those defenses actually allowed under a given statute. Thus, if a particular defense is deemed

irrelevant under the statute, a party has no *procedural* due process right to a hearing with respect to that defense. Instead, the party's only avenue of recourse is to declare that it has a right to present its chosen defense as a matter of *substantive* due process. *See, e.g., Burlington N.R.R. v. Dep't of Pub. Serv. Regulation,* 763 F.2d 1106, 1113 (9th Cir. 1985) ("If the statute is constitutional, the lack of a hearing does not make it unconstitutional. A state does not violate due process by making a legislative determination rather than a particularized inquiry if the subject of the legislation does not interfere with the exercise of fundamental rights."); *see also Bell v. Burson,* 402 U.S. 535, 541 (1971) ("The main thrust of Georgia's argument is that it need not provide a hearing on liability because fault and liability are irrelevant to the statutory scheme. We may assume that were this so, the prior administrative hearing presently provided by the State would be appropriate to the nature of the case." (citation and internal quotation marks omitted)).

Accordingly, the district court erred by not engaging in a two-step inquiry to determine, first, whether Plaintiffs were constitutionally entitled to raise foreign-affiliate and foreign-law defenses to HVIRA and, second, whether the statute provides Plaintiffs with the requisite level of process with respect to the defenses allowed under the statute. We will consider each aspect of this two-part analysis.

A. *Substantive Due Process and the Proposed Defenses*

Plaintiffs argue that, as a matter of substantive due process, they must be entitled to raise defenses premised on their lack of control over the required information or the

illegality under foreign law of their disclosure of the information.[11] We are not persuaded.

Because HVIRA neither employs a suspect classification nor infringes on a fundamental right, the applicable standard of review is the rational basis test. *See Richardson v. City of Honolulu,* 124 F.3d 1150, 1162 (9th Cir. 1997) ("We will strike down a statute on substantive due process grounds if it is arbitrary and irrational."); *Wedges/Ledges of Cal., Inc. v. City of Phoenix,* 24 F.3d 56, 66 (9th Cir. 1994) ("When reviewing the substance of legislation or governmental action that does not impinge on fundamental rights, . . . we do not require that the government's action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did."). Accordingly, the proper standard by which to measure HVIRA's license-revocation provisions is whether they bear "a rational relationship to a legitimate state interest." *Burlington N.,* 763 F.2d at 1109.

The Commissioner justifies the statute in several ways. First, the statute expressly states that its purpose is to provide California residents with information that facilitates their

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11. HVIRA *does* incorporate a "literal impossibility" defense. That is, if a company's Holocaust-era records no longer exist, the statute does not require their disclosure. Cal. Code Regs. tit. 10, § 2278.2(a); *Gerling II,* 186 F. Supp. 2d at 1105. The Commissioner also represents in his briefs that "[s]uspension could also be avoided if the information exists but is not in the possession, custody or control of the licensee or any of its related companies (e.g., if the information is in the possession of an unrelated company or is only located in a government archive)."

resolution of legitimate claims, if any, against private insurance companies through an international process or otherwise. Cal. Ins. Code § 13801.[12] Second, as we have acknowledged, California's legislature could have intended the statute to provide a means of protecting state residents from insurance companies that have not paid valid claims. *Gerling I,* 240 F.3d at 745. Third, the state has a legitimate interest in providing information to its citizens about the character of the family of insurance companies from which they are contemplating buying insurance.

Plaintiffs counter that the sole express *and* implicit purpose of the law is to force California-licensed insurers and their foreign affiliates to pay Holocaust-era claims. They ask us to reject the Commissioner's assertion of alternative purposes. Although subjectively the legislature's main purpose was to facilitate payment of Holocaust-era claims, we read the legislature's declared purposes to be somewhat broader than that. *See* Cal. Ins. Code § 13801(c), (e) (stating in part that insurers may be the sole source of information about Holocaust-era policies and that insurers have a responsibility to disclose that information to the state).

More importantly, however, the legislature's subjective or declared purpose is irrelevant in the context of rational basis review. A statute must be upheld under the rational basis

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12. Helping California residents recover on valid insurance claims is a legitimate governmental purpose. The record shows that many Holocaust survivors are poor; to the extent that information can facilitate their recovery of insurance (through the means that Plaintiffs themselves recognize as valid, or otherwise), it will ease the burden on the state's fisc.

analysis if it can be justified by *any* legitimate purpose, even one on which the government did not rely in enacting the statute, and even if the statute does a poor job of advancing the intended aims. *Dittman,* 191 F.3d at 1031 ("[W]e do not require that the government's action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did." (citation and internal quotation marks omitted)); *Richardson,* 124 F.3d at 1162 ("In a substantive due process challenge, we do not require that the City's legislative acts actually advance its stated purposes . . . ." (citation and internal quotation marks omitted)).

Faced with precedent suggesting that the California legislature's actual subjective or declared purpose in enacting the statute is irrelevant, Plaintiffs next argue that HVIRA's reporting requirements are not rationally related to any of the asserted purposes of the statute. They argue that the significance of the information requested under HVIRA cannot be analyzed meaningfully without considering whether Plaintiffs' affiliates were legally obligated to pay policyholders under foreign law. Similarly, they contend that, if the statute were directed at the integrity of California licensees, it would seek information not only on foreign affiliates' payment of Holocaust-related claims in Europe between 1920 and 1945, but also on all other aspects of the affiliates' claims-handling history. Further, they argue that there is no evidence of a relationship between Plaintiffs' current claims-handling practices in California and the claims-handling practices of their foreign affiliates in Europe dating back more than half a century ago. In other words, they argue that HVIRA is over-inclusive in some respects and under-inclusive in others.

But, under the rational basis test, California need not demonstrate that the statute will *actually* serve the articulated purposes. Instead, the statute is constitutional if the legislature rationally could have *believed* that HVIRA would promote a legitimate objective. *Dittman,* 191 F.3d at 1032; *Burlington N.,* 763 F.2d at 1110. Further, a statute need not be a comprehensive response to a given problem to be rationally related to a legitimate governmental interest. Instead, legislation may proceed " 'one step at a time' " and still satisfy the rational basis test. *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology,* 228 F.3d 1043, 1052-53 (9th Cir. 2000) (quoting *Williamson,* 348 U.S. at 489), *cert. denied,* 532 U.S. 972 (2001). The Holocaust is unique, and California's decision to proceed first with respect to these particular claims is both understandable and permissible. Finally, it is not only the claims-handling practices of 50 years ago that are at issue, but also the current and continuing failure of California-licensed insurers and their foreign affiliates to disclose information about any outstanding potentially valid claims.

Having thus established that, in general, HVIRA is constitutional under the rational basis test, we next must address whether the statute's failure to provide for foreign-affiliate and foreign-law defenses is *also* rationally related to legitimate governmental interests. We conclude that, even assuming that the California licensees do not have control of information in the hands of their foreign affiliates and that disclosure pursuant to HVIRA violates European data protection laws, those facts do not make the statute unconstitutional because it was rational for the legislature to require disclosure as a condition to holding an insurance license in

California. We agree with the Commissioner that the suggested defenses would hamper the state's ability to provide information to Holocaust victims and their families about potentially valid claims, to protect California citizens from insurance companies that have a history of refusing to pay valid claims or of refusing to inform potential beneficiaries about policy proceeds to which they may be entitled, and to inform California citizens about the character of the family of insurance companies from which they are contemplating buying insurance. California is entitled to condition the privilege of doing business in the state on the disclosure of information in which California has a legitimate interest.

Were a defense based on lack of control over requested information a requirement of substantive due process, an insurer could evade *any* kind of state disclosure statute or regulation simply by transferring all relevant documents to an affiliate over which it lacks direct control. Similarly, were a defense premised on foreign law required by due process, state regulatory efforts could be hindered by foreign statutes enacted for the purpose of shielding foreign corporations from routine reporting requirements.

Plaintiffs respond that, public policy notwithstanding, substantive due process requires that they be allowed to raise these defenses. They rely heavily on *Societe Internationale pour Participations Industrielles et Comerciales, S.A. v. Rogers,* 357 U.S. 197 (1958); *Falstaff Brewing Corp. v. Miller Brewing Co.,* 702 F.2d 770, 782-83 & n.8 (9th Cir. 1983); and *In re United States v. Sumitomo Marine & Fire Insurance Co.,* 617 F.2d 1365, 1369 (9th Cir. 1980).

However, those cases are easily distinguishable. *Societe Internationale* concerned only "whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order." 357 U.S. at 210. The Supreme Court made a point to limit its decision to the context of discovery sanctions:[13] "We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control." *Id.* at 205-06. In *Sumitomo,* this court *affirmed* a discovery sanction tantamount to dismissal even though the government-plaintiff was unable to comply with the district court's discovery orders due to "serious understaffing" rather than bad faith. 617 F.2d at 1369-70. Finally, *Falstaff* dealt with sanctions arising in the context of criminal contempt, where willful disobedience of a court order must be proved beyond a reasonable doubt. 702 F.2d at 782. We have found no decision holding that privacy protections under foreign law, or lack of control over

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13. Courts discussing *Societe Internationale* have interpreted the reach of its due process holding narrowly even in the context of discovery sanctions. *See, e.g., Richmark Corp. v. Timber Falling Consultants,* 959 F.2d 1468, 1474 (9th Cir. 1992) ("Cases since *Societe Internationale,* however, have emphasized that a foreign-law prohibition will not always excuse compliance with a discovery order."); *United States v. Vetco, Inc.,* 691 F.2d 1281, 1287 (9th Cir. 1981) ("*Societe Internationale* did not erect an absolute bar to summons enforcement and contempt sanctions whenever compliance is prohibited by foreign law."); *United States v. Bank of Nova Scotia (In re Grand Jury Proceedings),* 691 F.2d 1384, 1388 (11th Cir. 1982) ("[T]he Supreme Court did not erect an absolute bar to sanctions being imposed for noncompliance with summons or subpoenas whenever compliance is prohibited by foreign law.").

information, excuses compliance with disclosure obligations required as a condition for obtaining or retaining a business license.

By contrast, other persuasive precedents support the proposition that a statute may be constitutional yet at the same time make no allowance for an "impossibility" defense. *See, e.g., Danfield v. Johns-Manville Sales Corp. (In re Asbestos Litigation),* 829 F.2d 1233, 1235, 1244 (3d Cir. 1987) (upholding the constitutionality of state law prohibiting defendants from raising an impossibility defense to tort claims); *United States v. City of Hoboken,* 675 F. Supp. 189, 197-98 (D.N.J. 1987) (rejecting the defendant's substantive due process argument "that constitutional principles of fundamental fairness mandate an impossibility defense" to the Clean Water Act); *cf. Hawkins v. Agric. Mktg. Serv.,* 10 F.3d 1125, 1134 (5th Cir. 1993) (holding that a statute did not violate due process even though it mandated revocation of the plaintiff's license in response to behavior in which the plaintiff took no part, and despite the fact that the plaintiff had no opportunity to demonstrate his innocence).

Because a defense based on lack of control over records or on the conflicting demands of foreign law would thwart the legitimate regulatory purposes of HVIRA, we find no violation of substantive due process.

B. *Procedural Due Process Under HVIRA*

Plaintiffs argue that HVIRA is unconstitutional on its face because it makes no provision for a hearing prior to

revocation of an insurance company's license. The statute provides that "[t]he Commissioner *shall* suspend the certificate of authority to conduct insurance business in the state of any insurer that fails to comply with [HVIRA]." Cal. Ins. Code § 13806 (emphasis added). However, because the statute must be, and in fact is, interpreted to require such a hearing, HVIRA does not violate procedural due process on its face.

Plaintiffs' licenses to do business in California are protected property interests. *See Bell,* 402 U.S. at 539 ("Once licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."). The state may not revoke a protected property interest without first providing a meaningful hearing. *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976); *Bell,* 402 U.S. at 541-42.

Because HVIRA does not expressly provide for such a hearing, Plaintiffs assert that it is facially unconstitutional. What this argument fails to recognize is that, under California law, such a hearing must be implied into the statute. The state's administrative procedure act requires the provision of those procedures that are required by the federal or state constitutions. Cal. Gov't Code § 11410.10. Further, the California Supreme Court has established a presumption that hearing requirements should be inferred in a statute like HVIRA "unless the statute expressly provides to the contrary." *Fascination, Inc. v. Hoover,* 246 P.2d 656, 662 (Cal. 1952).

Thus, when read in the context of other state law, HVIRA requires the Commissioner to hold a hearing before revoking the license of an allegedly noncomplying insurance company. He concedes that this is so. As properly and as actually interpreted, therefore, the statute is not facially unconstitutional for failure expressly to provide for a hearing.

OTHER CONSTITUTIONAL CLAIMS

In addition to making due process arguments, Plaintiffs claim that HVIRA violates the foreign affairs power of the United States, the Commerce Clause, the Bill of Attainder Clause, the Equal Protection Clause, the Fourth Amendment, and the Contract Clause. None of these arguments provides a persuasive alternative justification for affirming the district court's decision.

A. *Foreign Affairs Power and Commerce Clause*

In response to Plaintiffs' challenges based on the foreign affairs power and the Commerce Clause, we already have held that HVIRA is *facially* constitutional. *Gerling I*, 240 F.3d at 751, 743. We are not persuaded that we erred.

Plaintiffs now argue that, *as applied*, HVIRA runs afoul of these constitutional provisions.[14] As discussed above, California has urged foreign insurers to help their state-

14. As Plaintiffs Assicurazioni Generali, American Insurance Association, and American Re-insurance Company candidly admit, "[i]nsurers ask the Court to *reconsider* its holdings on their foreign affairs power and Foreign Commerce Clause claims." (Emphasis added.)

licensed affiliates comply with HVIRA, but it has not sought to regulate these foreign insurers directly. That being so, the record contains insufficient evidence to demonstrate that the statute, as applied to Plaintiffs, is unconstitutional under the foreign affairs power or the Commerce Clause.

B. *Bill of Attainder Clause*

Next, Plaintiffs argue that HVIRA constitutes a bill of attainder because the statute seeks to punish a specific person or group of persons for past conduct without a judicial trial. *See* U.S. Const. art. I, § 10, cl. 1. We disagree.

"Three requirements must be met to establish a violation of the bill of attainder clause: '[S]pecification of the affected persons, punishment, and lack of a judicial trial.' " *United States v. Munsterman*, 177 F.3d 1139, 1141 (9th Cir. 1999) (quoting *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 847 (1984)). Assuming—without deciding—that HVIRA meets the first and third elements, it fails to meet the second.

We consider three factors when determining whether "a statute inflicts punishment that implicates the Bill of Attainder Clause." *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 728 (9th Cir. 1992). We ask "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a [n] . . . intent to punish.' " *Id.* (quoting *Selective Serv. Sys.*, 468 U.S. at 852).

First, the statute does not fall within the historical meaning of legislative punishment. The ultimate sanction available to the Commissioner, suspension of an insurer's license to do business, may be such a punishment. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 474-75 (1977) (noting that legislative punishment includes "barring designated individuals or groups from participation in specified employments or vocations"); *Selective Serv. Sys.*, 468 U.S. at 852 ("[T]he list of punishments forbidden by the Bill of Attainder Clause has expanded to include legislative bars to participation by individuals or groups in specific employments or professions."). Even if it is, however, suspension can occur only after a California insurer fails to comply with the statutory demand for information; that is, the statute imposes a sanction on the basis of an insurer's future conduct. Generally, a statute that leaves open the possibility of compliance, and thus avoidance of punishment, does not fall within the historical meaning of legislative punishment. *See id.* at 853 (upholding a statute denying educational funding to students who failed to register for the draft, in part because the statute allowed students to qualify for aid after properly registering).

Second, as discussed above, HVIRA furthers nonpunitive legislative purposes: providing data to Holocaust victims and their families about potentially valid claims, protecting California citizens from insurance companies that have a history of refusing claims or refusing to disclose information, and telling California citizens about the character of the family of insurance companies from which they are contemplating buying insurance.

Third, the legislative record does not evince an intent to punish foreign insurance companies or their California-licensed affiliates. As even Plaintiffs concede, the text of the statute and its legislative history demonstrate that the statute was subjectively intended as a means of facilitating payment of Holocaust-era policies.[15] Being asked to account for potentially valid insurance claims is not punishment, even if it proves embarrassing to some insurers. Nowhere in the statute's history does the California legislature express a desire to "punish" California insurers or their foreign affiliates. Because HVIRA is not a "punishment," it is not an unconstitutional bill of attainder.

C. *Contract Clause*

Plaintiffs assert that HVIRA violates the Contract Clause by attempting to modify the express terms of European insurance policies. *See* U.S. Const. art. I, § 10, cl. 1. By doing so, they argue, HVIRA would substantially impair the rights and responsibilities of parties to private contracts entered into decades ago and having no relation to California. As we have explained, this argument mischaracterizes the nature of the statute and the relevance of its definition of the term "proceeds." HVIRA, as distinct from other California statutes whose constitutionality is *not* at issue here, does not compel payment of any Holocaust-era claim and does not alter the substance of any insurance contract. Accordingly, HVIRA does not violate the Contract Clause.

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15. The other legitimate purposes that we have discussed above, to the extent that they are reflected in the legislative record, likewise involve no intent to punish insurers.

D. *Equal Protection Clause*

Plaintiffs argue that HVIRA violates equal protection. However, Plaintiffs do not assert that the statute treats them differently as a result of their membership in a protected class. Instead, they claim only that HVIRA imposes weightier reporting burdens on insurance companies that either directly or through related entities sold insurance policies in Europe from 1920 to 1945. In the circumstances, we evaluate the equal protection challenge under the rational basis test. *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 668 (1981).

In this context, Plaintiffs again urge that the Commissioner can articulate no rational basis sufficient to justify the statute. However, for the reasons discussed above, we disagree. Consequently, the insurers have not demonstrated that HVIRA violates equal protection.

E. *Fourth Amendment*

Finally, Plaintiffs argue that HVIRA violates the Fourth Amendment. Like the equal protection argument, however, this claim is simply a rearticulation of another argument: Because HVIRA purportedly exceeds California's legislative jurisdiction, its investigation into the affairs of European insurance companies is an unconstitutional search. According to Plaintiffs, an investigation exceeds the scope of a governmental agency's investigatory power if it is one that the demanding agency is not authorized to make. They cite in support of this proposition *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946).

We have no quarrel with the general proposition. But HVIRA does not empower the Commissioner to make disclosure requests that exceed his constitutional authority. Therefore, the statute does not violate the Fourth Amendment in the manner argued.

ATTORNEY FEES

Plaintiffs assert that the district court abused its discretion by denying their motion for attorney fees. Because the district court improperly concluded that HVIRA was unconstitutional, it also erred in concluding that Plaintiffs were "prevailing parties" for the purposes of 42 U.S.C. § 1988. They are not entitled to fees.

CONCLUSION

HVIRA is not unconstitutional in any of the particulars argued by Plaintiffs. The district court erred in concluding otherwise.

REVERSED and REMANDED with instructions to vacate the injunction and to grant the Commissioner's motion for summary judgment.

Appendix A

ORDER AND DENIAL OF REHEARING DATED SEPTEMBER 9, 2002

The opinion filed July 15, 2002, is amended as follows:

On slip opinion page 9856, line 3 from the bottom, insert ", denied the Commissioner's summary judgment motion," so the sentence reads as follows: "The court granted Plaintiffs' summary judgment motion, denied the Commissioner's summary judgment motion, and permanently enjoined the Commissioner from enforcing the statute."

On slip opinion page 9857, second full paragraph, replace the first sentence and citation with: "We review de novo the district court's grant or denial of summary judgment. *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1164 (9th Cir. 2000)."

On slip opinion page 9882, last two lines, replace with: "REVERSED and REMANDED with instructions to vacate the injunction and to grant the Commissioner's motion for summary judgment."

The panel has voted to deny the Plaintiffs' petitions for panel rehearing. With the above amendments, the panel has voted to deny the Defendant's petition for panel rehearing. Judges Graber and Paez have voted to deny the Plaintiffs' petitions for rehearing en banc, and Judge Goodwin has so recommended.

Appendix A

The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on the petitions.

The Plaintiffs' petitions for panel rehearing and petitions for rehearing en banc are DENIED. With the above amendments, the Defendant's petition for panel rehearing is DENIED.

No subsequent petitions for rehearing or rehearing en banc may be filed.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED OCTOBER 1, 2001 AND FILED OCTOBER 2, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CIV. S-00-0506 WBS JFM

Consolidated Cases:
No. CIV. S-00-0613 WBS JFM
No. CIV. S-00-0779 WBS JFM
No. CIV. S-00-0875 WBS JFM

GERLING GLOBAL REINSURANCE CORP. OF AMERICA, et al.,

Plaintiffs,

v.

HARRY LOW, in his capacity as the INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,

Defendant.

MEMORANDUM AND ORDER

In October 1999, California enacted the Holocaust Victim Insurance Relief Act ("HVIRA"). *See* Cal. Ins. Code §§ 13800-13807 and accompanying regulations, Cal. Code Regs. Tit. 10 §§ 2278-2278.5. HVIRA relates to claims asserted by Holocaust victims or their heirs or beneficiaries for coverage under insurance policies issued in Europe

between 1920 and 1945. The stated purpose of HVIRA is to ensure that insurance companies doing business in the State of California disclose to the state "any involvement they or their related companies may have had with insurance policies of Holocaust victims." Cal. Ins. Code § 13801(e). HVIRA further declares that insurers in California have a responsibility to "ensure the rapid resolution of these questions [regarding unpaid Holocaust-era insurance policies], eliminating further victimization of these policyholders and their families." *Id.*

After briefing and a hearing regarding various constitutional challenges to the statute, this court found, in June of 2000, that plaintiffs had shown a probability of success on the merits of two of their claims: (1) that HVIRA interferes with the federal government's control over foreign affairs; and (2) that HVIRA violates the Commerce Clause, and therefore granted a preliminary injunction enjoining enforcement of the statute. The Ninth Circuit reversed the holdings upon which that injunction was based, but left the injunction in place, specifically referencing the "possibility" that HVIRA violates the Due Process Clause. *Gerling Global Reins. Corp. of Am. v. Low*, 240 F.3d 739, 754 (9th Cir. 2001), *petition for cert. filed* (U.S. June 26, 2001) (No. 00-1926).

The matter is now before this court on the parties' cross motions for summary judgment. All plaintiffs jointly move for summary judgment on the grounds that HVIRA violates the Due Process Clause because: (1) it is an extraterritorial regulation enacted in excess of California's legislative jurisdiction; and (2) it mandates the performance of impossible tasks and provides for automatic license

revocation upon non-performance. Defendant moves for summary judgment, and for the preliminary injunction to be dissolved, on the grounds that: (1) the Ninth Circuit's decision precludes any claim that HVIRA violates either the Foreign Affairs Power or the Commerce Clause; (2) HVIRA does not violate the Due Process Clause; and (3) HVIRA is not unconstitutional for any other reason raised in any plaintiff's complaint.

I. *Facts*

A. *The Statututory Framework*

After the National Socialist (NAZI) party came to power in Germany, it enacted a series of statutes authorizing governmental confiscation of Jewish property and other assets. These laws included insurance proceeds among the types of property that the government was authorized to seize from Jews. Under the NAZI statutes, German insurers were required to pay the proceeds of insurance policies of Jewish residents to "blocked accounts" controlled by the NAZI government. A 1943 statute also ordered confiscation of the estates of deceased Jews. Furthermore, although many Holocaust victims had insurance policies, many lost the papers during their imprisonment. In many cases, the persons most knowledgeable about the policy were killed, leaving heirs without a paper trail. As a result, many Holocaust victims and their descendants and heirs have never collected on their insurance policies.

HVIRA requires insurance companies doing business in California to file reports disclosing policies issued in Europe during the period 1920-1945. *See* Cal. Ins. Code §§ 13800-

13807. Other enabling statutes extend the statute of limitations for filing such claims (Cal. Civ. Proc. Code § 354.5), and provide procedures for the suspension of licenses of insurance companies who have not paid valid claims (Cal. Ins. Code § 790.15).[1]

B. *The Challenged Statute: California Insurance Code §§ 13800-13807 ("HVIRA")*

HVIRA obligates insurers doing business in California to file reports identifying insurance policies (life, property, liability, health, annuities, dowry, educational, or casualty) sold to persons in Europe between 1920 and 1945 directly or through a "related company." Cal. Ins. Code § 13804(a). A "related company" is defined as "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer." Cal. Ins. Code § 13802(b).

Specifically, the statute requires the insurer or related company to file with the registry: (1) the number of those insurance policies; (2) the holder, beneficiary, and current status of those policies; and (3) the city of origin, domicile, or address for each policy holder. Cal. Ins. Code § 13804(a). Filing false information under this section is punishable by civil penalties of up to $5,000.00 per policy.

Further, with regard to each policy, the insurer must certify one of the following: (1) that the proceeds of the policies have been paid to the designated beneficiaries or

1. Defendant's motion to dismiss plaintiffs' constitutional challenges to Cal. Civ. Proc. Code § 354.5(c) and Cal. Ins. Code § 790.15(c) for lack of standing was granted in June of 2000.

their heirs where that person or persons, after diligent search, could be located and identified; (2) that the proceeds where the beneficiaries or heirs could not, after diligent search, be located or identified, have been distributed to Holocaust survivors or to qualified charitable nonprofit organizations for the purpose of assisting Holocaust survivors; (3) that a court of law has certified in a legal proceeding resolving the rights of unpaid policyholders, their heirs, and beneficiaries, a plan for the distribution of the proceeds; or (4) that the proceeds have not been distributed and the amount of those proceeds. Cal. Ins. Code § 13804(b).[2]

The statute also directs that, if the reports are not filed by the 210th day after the HVIRA becomes effective, the Commissioner "*shall* suspend the certificate of authority to conduct insurance business in the state. . . ." Cal. Ins. Code § 13806. (emphasis added).

C. *The Parties*

Defendant is Harry Low in his capacity as the Commissioner of Insurance of the State of California. Plaintiffs are insurance companies licensed to do business in California. Four sets of plaintiffs originally filed separate complaints against then-Insurance-Commissioner Chuck Quackenbush. Those cases were consolidated as the present action and the plaintiffs now move jointly.

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2. The term "proceeds" is defined in the statute as "the face value or other payout of insurance policies and annuities plus reasonable interest to date of payment without dimunition for war-time or immediate postwar currency devaluation." Cal. Ins. Code § 13802(c).

Appendix B

1. *Gerling Global Reinsurance Corporation of America ("the Gerling plaintiffs")*

The Gerling plaintiffs are five insurance companies licensed to do business in California. They are "related to" or "affiliated" with two German companies (Gerling-Konzern Allgemenine Versicherungs-AG ("GKA") and Gerling-Konzern Lebensversicherungs-AG ("GKL")) that issued policies in Europe during the proscribed time period.

GKA and GKL do not conduct any business in the State of California either directly or through the Gerling plaintiffs. None of the Gerling plaintiffs is in possession, custody or control of records pertaining to any insurance policies in force in Europe at any time between 1920 and 1945. Further, the Gerling plaintiffs contend that they have no means to compel such information from their German affiliates. GKA and GKL believe that if they produce the information demanded by the HVIRA, they will face criminal and civil penalties under German law.[3]

2. *American Insurance Association and American Re-Insurance Co. (the "American plaintiffs")*

The American plaintiffs are American Insurance Association ("AIA") and American Reinsurance Company ("AmRe"). AIA is a national trade association of insurers, some of whom do business in California. AIA principally represents American insurance companies that did not issue

3. The parties have submitted competing expert declarations reaching differing conclusions as to whether German privacy law actually does preclude the HVIRA-mandated disclosures.

insurance policies in Europe during the relevant period and do not own or control any companies that did.[4] Several members of AIA are, however, "related to" European companies that issued policies during the relevant time period. AIA's affected members contend that they lack the corporate authority to compel their related European companies to produce the information required by the HVIRA. Further, plaintiffs believe that the law of the related European company's country forbids the disclosure of the kind of information required by HVIRA.

AmRe is a large insurance company licensed to do business in California. Neither AmRe, nor any subsidiary or affiliate over which it has control, issued insurance policies that were in effect in Europe from 1920 to 1945. AmRe is subject to the HVIRA's reporting requirements because it is "related," through its parent corporation, Munich Re, to two European insurers that issued insurance policies in Europe from 1920 to 1945. AmRe contends that neither AmRe nor Munich Re has the corporate authority to compel these European companies to produce the information required by the HVIRA. Further, according to AmRe, Munich Re believes it would have to violate German law in order to comply with HVIRA.

3. *Winterthur International American Insurance Co., et al. ("the Winterthur plaintiffs")*

The Winterthur plaintiffs are nine insurance companies licensed to do business in California. None of the companies

4. American Insurance does represent Assicurazioni Generali, a European Company discussed separately herein.

ever issued insurance policies in Europe during the applicable time period, though each is "related" to such a company. Each plaintiff claims, however, that it is not in possession, custody, or control of any records pertaining to insurance policies sold by "related companies." Further, the Winterthur plaintiffs contend that they lack the corporate authority to compel the production of the information required by the HVIRA. They also believe that to do so would violate European law.

4. *Assicurazioni Generali, S.p.A. ("Generali")*

Generali is an Italian corporation licensed to do business in California. It issued insurance policies in Europe during the applicable time period. The policies in question were issued in Europe to European insureds. According to Generali, these policies typically incorporated terms and conditions regulated by the laws of the country of issuance. For example, local laws "typically" required that reserves earmarked for these policies were to be maintained in the country of issuance and invested locally. (Carnicelli Decl. ¶ 3.). Apparently, some of the policies also included forum selection clauses requiring that disputes be heard in the country of issuance.

Though Generali cannot make the argument that it lacks the corporate authority to obtain the information necessary to comply with HVIRA, it has joined the joint motion arguing that making those disclosures would violate German law and subject the company to criminal and civil penalties.

Appendix B

D. *Defendant's Enforcement and Interpretation of the HVIRA Statutory and Regulatory Scheme*

1. *Prior to the Preliminary Injunction*

Prior to the issuance of the preliminary injunction, then-Commissioner Chuck Quackenbush actively threatened enforcement against all plaintiffs. He subpoenaed many insurance companies, including plaintiffs and those represented by plaintiffs, to appear at a hearing on December 1, 1999. At that hearing, Quackenbush informed the insurance companies, "[t]his issue will be resolved in California. I promised that for the last two years. And on April 6th, you're going to see just how serious California is if you have not complied with this law." (Agel Decl., Ex. 18, Transcript of December 1, 1999 Investigatory Hearing, 14:16-20). He told Generali specifically, "I want you to take back to your officers in Italy and everywhere else, that you might want to consider seriously leaving the State, because it's obvious to me right now that you have no intention of complying with the law." (Agel Decl., Ex. 18, 49:12-16). At the end of questioning Generali, Quackenbush stated generally, "[i]t is your choice now whether you're going to work with this Department of Insurance to bring your company in full compliance, whether you're going to leave the state voluntarily, or whether I'm going to kick you out. That's your three choices." (Agel Decl., Ex. 18, 51:19-23).

The preliminary injunction has prevented any such action as of yet. Meanwhile, there has been a change of leadership at the Department of Insurance, and plaintiffs have taken discovery regarding the manner in which the Department interprets and would implement HVIRA.

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2. *Since the Preliminary Injunction*

Leslie Tick, a senior counsel at the California Department of Insurance who is responsible for administering HVIRA, gave deposition testimony in this case as the Department's spokesperson on July 5, 2001. She testified that the only defense to non-compliance with HVIRA's reporting requirements is that the required documents do not exist. Failure to comply for any other reason, including lack of the corporate authority to compel production of the information or a belief that doing so would violate applicable European law, will trigger a license suspension action. (Agel Decl., Ex. 17, Tick Depo. at 227:9-238:17, 252:13-266:16).

Under questioning as to how HVIRA's mandatory suspension provision would be carried out by the Department, Ms. Tick further testified that a license suspension proceeding would involve a hearing before an administrative law judge to determine whether the insurer had complied with the statute. The judge would not, however, be able to exercise any discretion in his determination depending on whether the insurer was participating in good faith in ICHEIC, or whether the insurer could show that it did not control the information sought by HVIRA, or whether it could show that it or its affiliates were barred from producing the information by European privacy laws. *Id.* at 175:5—176:13.

II. *The Standard*

The court must grant summary judgment to a moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,

if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party adverse to a motion for summary judgment may not simply deny generally the pleadings of the movant; the adverse party must designate "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Simply put, "a summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). The non-moving party must show more than a mere "metaphysical doubt" as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

III. *Plaintiffs' Joint Motion for Summary Judgment*

Plaintiffs jointly move for summary judgment on the ground that HVIRA is an unconstitutional violation of the Due Process Clause of the U.S. Constitution.

A. *Law of the Case Doctrine*

The parties dispute both the meaning and effect of the Ninth Circuit's decision in *Gerling v. Low*, 240 F.3d 739 (9th Cir. 2001). As a threshold matter, it must be determined what issues are now properly before this court.

Defendant contends that the Ninth Circuit's *Gerling v. Low* opinion "effectively disposes of" all of plaintiffs' claims. Defendant argues: (1) that the Ninth Circuit's ruling finally disposes of plaintiffs' Commerce Clause and Foreign Affairs Power arguments; and (2) that the following language

from the opinion precludes any argument that the statute regulates extraterritorially because it is controlling under the "law of the case" doctrine: "HVIRA is a California insurance regulation of California insurance companies . . . [and] does not regulate foreign insurance policies, or control the substantive conduct of a foreign insurer, or otherwise affect the 'business of insurance' in any other country." *Id.* at 746.

Under the "law of the case" doctrine a decision of the court in a prior appeal must be followed in all subsequent proceedings in the same case. *Eichman v. Fotomat Corporation*, 880 F.2d 149, 157, (citing *Waggoner v. Dallaire*, 767 F.2d 589, 593 (9th Cir. 1985)), *cert. denied*, 475 U.S. 1064 (1986). This rule applies unless the first decision is clearly erroneous and would result in manifest injustice, an intervening change in the law has occurred, or the evidence on remand is substantially different. *Id.* It applies even where the first panel's holding was "cryptic and somewhat ambiguous." *Hanna Boys Ctr. v. Miller*, 853 F.2d 682, 687 (9th Cir. 1988); *see also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (the relevant inquiry on a law of the case question is whether a court previously decided an issue, not whether, or how well it explained the decision); *and Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (9th Cir. 1995) (even issues treated summarily, without detailed explanation or analysis, become the law of the case).

While affirming this court's grant of plaintiffs' motion for a preliminary injunction, the Ninth Circuit ruled as follows:

> We hold that the district court erred when it decided that HVIRA violates the dormant Commerce Clause

> and the foreign affairs power. However, because the district court has not addressed Plaintiffs' claim that HVIRA violates the Due Process Clause, we leave the preliminary injunction in place and remand for further proceedings.

Gerling v. Low, 240 F.3d at 754.

As for the question of which legal issues remain open, the Court of Appeals in this case was quite explicit. It unambiguously intended to close the questions of HVIRA's constitutionality under the Commerce Clause or Foreign Affairs Power, but, just as clearly, it intended to leave open the question of whether the statute violates the Due Process Clause.

Defendant cites *Eichman*, 880 F.2d at 157, for the proposition that the law of the case doctrine encompasses both "a court's explicit decisions" and those "decided by necessary implication" and therefrom argues that the Ninth Circuit's prior ruling disposes of all of plaintiffs' claims, including the Due Process claims. Given its affirmation of the preliminary injunction and the specific language of its remand, the Ninth Circuit's opinion in this case cannot reasonably be read to "necessarily imply" that plaintiffs' due process claims are foreclosed.

For their part, plaintiffs contend that the Ninth Circuit's legal rulings should be given no weight at all on summary judgment because plaintiffs' pending Supreme Court certiorari petition renders the Commerce Clause and Foreign Affairs Power arguments unripe for decision.

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Plaintiffs argue that "[n]o purpose would be served by entering judgment on these claims, only to have the Supreme Court grant certiorari in October and reverse the Ninth Circuit on the merits." This court, however, is bound by existing rulings of the Ninth Circuit unless and until they are withdrawn or overturned; justice is not served by the type of speculative delay plaintiffs advocate.

Defendant's argument that certain factual findings are also the law of the case requires a slightly different analysis. Defendant's argument focuses on the Ninth Circuit's finding that HVIRA does not regulate foreign insurance policies, control the conduct of foreign insurers, or otherwise affect the "business of insurance" in foreign countries. *Gerling v. Low*, 240 F.3d at 746. This was a factual finding made in a "foreign commerce" context during an interlocutory appeal of a preliminary injunction. Findings on interlocutory appeals of preliminary injunctions do not generally constitute "law of the case". *City of Angoon v. Hodel*, 803 F.2d 1016, 1024 n.4 (9th Cir. 1986) (citations omitted).

The basis for distinguishing between factual findings made on direct appeal and factual findings made on interlocutory appeal of a preliminary injunction is that "the standard of review for factual determinations on direct appeal is higher than the standard applied during an interlocutory appeal of a preliminary injunction." *Royal Insurance Co. v. Quinn-L Capital Corp.*, 3 F.3d 877, 881 (5th Cir. 1993). Where, as here, a factual finding (i.e., that a statute regulates foreign conduct) did not survive the lower standard of review, it is arguably unlikely that the same or similar finding would

have survived or will survive the higher standard of review applied by the same court on direct appeal. This reasoning weighs in favor of applying the law of the case doctrine to all of the Court of Appeals' findings.

There are, however, likely to be contextual distinctions when a proposed factual finding is analyzed under or applied to disparate constitutional claims. Consequently, this court does not read the Ninth Circuit's opinion in this case to preclude plaintiffs from arguing that HVIRA regulates extraterritorially for the purposes of making their due process arguments. No aspect of plaintiffs' due process argument is now foreclosed by the "law of the case" doctrine.

B. *Due Process*

The Ninth Circuit left the preliminary injunction in place and specifically remanded to this court for consideration of the constitutionality of HVIRA under the Due Process Clause. All plaintiffs now challenge the statute on two due process grounds: (1) that it is an extraterritorial regulation enacted in excess of the state's legislative jurisdiction; and (2) that it mandates the performance of impossible tasks and provides for automatic license revocation upon non-performance.

1. *Whether HVIRA Violates Due Process Because it Was Enacted in Excess of California's Legislative Jurisdiction*

Plaintiffs argue that HVIRA violates the Due Process Clause because it was enacted in excess of California's

legislative jurisdiction. Defendant counters that, as a mere "licensing and reporting statute," HVIRA is a proper exercise of California's legislative jurisdiction.[5]

"Legislative jurisdiction" is a concept that courts have applied to describe the due process limits on the legislative power of a state. It is a concept employed to "determine the extraterritorial reach of a statute." *Adventure Communications Inc. v. Kentucky Registry of Election Finance*, 191 F.3d 429, 435 (4th Cir. 1999) (quoting *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting)). Like other jurisdictional doctrines, legislative jurisdiction is a threshold question. Applying guidelines similar to those used to determine personal jurisdiction, it requires that a state must have a significant contact or significant aggregation of contacts, creating state interests, such that application of its law is neither "arbitrary nor fundamentally unfair." *Adventure Communications*, 191 F.3d at 436-37 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)).

While noting that "it is possible that HVIRA violates the Due Process Clause," the Ninth Circuit made specific reference to *Gerling Global Reins. v. Nelson*, 123 F. Supp 2d 1298 (N.D. Fla. 2000), a recent Florida district court case that invalidated a Holocaust-era insurance statute on legislative jurisdiction grounds. The distinctions between

5. Plaintiffs also argue that "[s]ince the HVIRA does not regulate extraterritorially, plaintiff's legislative jurisdiction claims fail as a matter of law." For reasons discussed above, however, the court rejects defendant's contention that plaintiffs' legislative jurisdiction arguments are precluded by the law of the case doctrine.

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Florida's statute and California's HVIRA are illustrative of the purpose and effect of the legislative jurisdiction doctrine.

Florida's "Holocaust Victims Insurance Act," § 626.943, Fla. Stat. (1999), like California's HVIRA, requires insurers doing business in Florida to provide extensive information to the Florida Department of Insurance regarding policies issued to Holocaust victims by the insurers themselves or by any "parent, subsidiary, or affiliated company." § 626.9543(3)(d) & (7), Fla. Stat. (1999). The Florida statute also requires, however, that insurers actually pay claims on those policies, if such claims are established under a "reasonable, not unduly restrictive, standard of proof." § 626.9543(5)(b), Fla. Stat. (1999). Moreover, through its implementing regulations, it requires insurers doing business in Florida to pay not only their own claims but also to pay claims against any parent, subsidiary or corporate affiliate. *See* Rule 4-137.010(6), Fla. Admin. Code.

The Florida statute plainly attempted to exercise jurisdiction over the specific enforcement of European insurance contracts. In fact, the Florida Insurance Commissioner did not even try to justify the statute as a "means of determining whether plaintiffs themselves or their officers are fit to engage in the business of insurance in Florida," but instead acknowledged to the *Nelson* court that the statute's goal was to "bring about payment of amounts due." *Nelson*, 123 F. Supp 2d 1298, 1303 n. 9. Not surprisingly, the *Nelson* court held that "the efforts of the State of Florida to reach transactions entered in Germany between German parties having no connection with Florida are beyond the state's jurisdiction." *Id.* at 1304.

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Plaintiffs in this case argue that "similar legislative findings" preceded enactment of the California and Florida statutes. Those similarities, however, do not overcome the differences in the actual language and effect of the two statutes. Florida's statute is a far more direct attempt to "regulate extraterritorially," as contemplated by the legislative jurisdiction doctrine, than is HVIRA. Most notably, HVIRA lacks any mandate requiring insurers to actually pay claims. Plaintiffs have not established that HVIRA violates due process because it was enacted in excess of the state's legislative jurisdiction. Plaintiffs' motion for summary judgment on that ground must therefore be denied.

2. *Whether HVIRA Violates Due Process Because it Mandates the Performance of Impossible Tasks and Provides for Automatic License Revocation upon Non-Performance*

a. *Whether a license to do business as an insurer is a protected property interest for purposes of a Fourteenth Amendment analysis.*

The "threshold requirement to a substantive or procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution." *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972); *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994); *Kraft v. Jacka*, 872 F.2d 862, 866 (9th Cir. 1989). Courts have long wrestled with the question of exactly what "interests" the Fourteenth Amendment protects. Trying to define the constitutional concepts of "property interest" and "due process," early U.S. Supreme Court decisions looked back as far as the signing of the Magna Carta, "when the

great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown." *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877). More recently, we have recognized that our definition of a Fourteenth-Amendment-protected property interest is rooted in the idea that our property interests provide our "sources of security." *See Goldberg v. Kelly*, 397 U.S. 254, 263 n.8 (1970) (quoting Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1255 (1965)).

For decades now, courts have recognized protected property interests in many forms which fall outside the norm of common-law property. *See e.g. Mathews v. Eldridge*, 424 U.S. 319 (1976) (individual's interest in continued receipt of social security benefits is a statutorily-created property interest for purposes of a due process analysis); *and Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) (the rights of a party under a patent are a protected property interest for purposes of a due process analysis). Indeed, the Supreme Court has made it abundantly clear that "the property interests protected by due process extend well beyond actual ownership of real estate, chattels, or money." *Roth*, 408 U.S. at 571-72 (citing *Connell v. Higginbotham*, 403 U.S. 207, 208 (1971)).

Courts have also long recognized that licenses which enable one to pursue a profession or earn a livelihood are protected property interests for purposes of a Fourteenth Amendment analysis. "Once licenses are issued. . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state

action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Bell v. Burson*, 402 U.S. 535 (1971) (addressing suspension of drivers' licenses). The Ninth Circuit has specifically recognized that an existing license, in contrast to an applied-for license, constitutes a legitimate entitlement of which one cannot be deprived without due process. *See Greenwood v. Federal Aviation Administration*, 28 F.3d 971, 975 (9th Cir. 1994) (addressing suspension of pilot's license).

The Commissioner nonetheless advances the argument that doing business as an insurer in California is a "mere privilege" which, he argues, can be summarily withdrawn for "any legitimate reason" the State chooses, divines or fashions. Categorizing plaintiffs' licenses as "privileges" bestowed by the state does not immunize their suspension from a due process challenge. The Supreme Court has specifically "rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege.' " *Graham v. Richardson*, 403 U.S. 365, 374 (1971). An existing license to do business as an insurer in California is a property interest deserving of Fourteenth Amendment protection. Any action to suspend such a license must therefore be taken in conformity with the requirements of procedural due process.

b. *Ripeness of plaintiff's procedural due process challenge*

"Ripeness is peculiarly a question of timing." *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580 (1985). "Its basic rationale is to prevent the courts, through premature

adjudication, from entangling themselves in abstract disagreements." *Id.* In considering whether a case is ripe for review, a court must evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. *Winter v. California Med. Review, Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1990).

"The critical question concerning fitness for review is whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all." 15 Moore's Fed. Practice, § 101.76[1][a] (3d ed. 1999); *see also Union Carbide*, 473 U.S. at 580-81 (noting that a central component of the fitness for review factor is whether the motion involves uncertain or contingent future events that may never occur.) Though a procedural due process challenge here might theoretically be susceptible to the argument that it will not ripen until plaintiffs have actually been deprived of their protected property interest (i.e. until the Commissioner has made a final determination that plaintiffs' licenses should be suspended), the record in this case is now developed to the point that no legitimately unknown contingencies exist.

As for the second factor under *Winter*, all parties in this case will suffer hardship if determination of the constitutionality of HVIRA is further delayed. Plaintiffs, in particular, know with absolute certainty that, if HVIRA takes effect, suspension of their licenses to do business as insurance companies in California will follow forthwith. Waiting for this harm to be suffered, not only by the companies themselves, but by all the citizens of California who are their customers and employees, serves no one.

The court therefore concludes that the case is ripe for, and justice is best served by, a present determination of whether HVIRA survives a procedural due process challenge.

c. *Procedural due process's meaningful hearing requirement*

The court therefore turns to the question of whether HVIRA's procedures provide due process. "A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case." *Burson*, 402 U.S. at 540. The procedural safeguards sufficient to protect one's interest in welfare benefits, for example, may not suffice when one faces a felony charge. *Compare Goldberg v. Kelly*, 397 U.S. 254 (1970), *with Gideon v. Wainwright*, 372 U.S. 335 (1963). There are, however, certain longstanding bare minimum components to the right to procedural due process.

The opportunity to be heard "at a meaningful time and in a meaningful manner" is the fundamental requirement of procedural due process. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). For over one hundred years, our courts have held that due process of law requires "specific charges, due notice of such charges, an opportunity to make specific answers to them, an opportunity to cross-examine the witnesses in support of them, an opportunity to adduce testimony in contradiction of them, and an opportunity for argument upon the testimony and upon the law and facts." *United States ex rel. Wedderburn v. Bliss*, 12 App. D.C. 485, 493 (1898). Thus, in order to satisfy due process' "meaningful

hearing" requirement, the inquiry that is made must involve at least some assessment of fault or liability. *See Burson*, 402 U.S. at 539.

On its face, HVIRA makes no provision for any hearing whatsoever. Defendant argues that the statute's facial lack of a hearing provision does not render it unconstitutional because the right to a hearing must be "implied into" the statute itself in the absence of language to the contrary. *See Fascination Inc. v. Hoover*, 39 Cal.2d 260 (1952).[6] The hearing that will be provided under HVIRA, to the extent that HVIRA contemplates a hearing at all, however, is not a meaningful hearing for the purposes of surviving a due process challenge. Defendant's position, supported by the plain language of the statute, is that an insurer's failure to produce documents, for any reason other than the fact that no documents exist, will trigger an immediate license suspension action. According to defendant, that action will take the form of a hearing before an administrative law judge. Leslie Tick's testimony and the statute itself make it clear that the administrative law judge is not permitted to exercise

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6. Defendant, having thus apparently conceded that plaintiffs would be entitled to a hearing, (indeed, having argued that a hearing is so obviously necessary as to be implied), later cites *Codd v. Velger*, 429 U.S. 624, 628 (1977), for the proposition that "a hearing need not be provided when there are no factual issues in dispute." In other words, a hearing would be required in theory, but would not be required in application, because, here, there would be no facts to resolve. A statute that sustains such contrary reasoning in its defense, because it facially obviates any practical need for the impliedly-necessary and constitutionally-required hearing, must be a violation of due process.

any discretion as to whether non-compliance might be excused or justified, or mitigated in any way that could affect the outcome of the hearing.

Thus, as both this court and the defendant interpret the statute, the same sole fact that triggers the suspension hearing will dictate its outcome. That cannot possibly amount to a meaningful hearing. Such a "hearing" is particularly meaningless where, as here, the same individual who decides to trigger the hearing makes the final determination of whether to suspend the license.[7] Under HVIRA, failure to produce the demanded records for any reason at all, even impossibility, effectively results in automatic license suspension. This is the deprivation of a protected property interest without due process of law.

Defendant contends that there are disputed issues as to whether plaintiffs, as they have asserted, actually lack the corporate authority to compel production of the demanded documents from their affiliates. Other than raising evidentiary objections to plaintiffs' declarations and making legal arguments about the meaning of the word "control," defendant has not presented any substantial evidence to create a triable issue of fact on the question of corporate control. Defendant also disputes, and asks this court to determine as a matter of law, whether foreign criminal and civil laws

7. Section 790.15 specifies that an action to suspend a certificate of authority under this section shall be conducted in accordance with the Administrative Procedure Act. That Act directs that the "agency" itself, in this case, the Commissioner, render the final decision. Cal. Govt. Code § 11517.

prohibit production of the information required by HVIRA.[8] On a procedural due process analysis, however, the question of whether plaintiffs could ultimately prove that it is impossible for them to comply with HVIRA does not control.[9] The fact that the statute *denies them the opportunity to be heard on that point*, or, for that matter, on any point, is what controls.

d. *Whether the state's "licensure power" somehow obviates plaintiffs' entitlement to a meaningful hearing under procedural due process*

Defendant argues that "California can rationally condition the privilege of doing business in the State" on

8. Though the court declines to reach a conclusion of law as to whether German and/or Swiss laws prohibit plaintiffs' European affiliates from complying with HVIRA, the court notes that, other than making evidentiary objections, defendant has not presented evidence to refute the submitted position of the Swiss government as to the impact of Article 273 of the Swiss Penal Code. Moreover, if it were to reach the issue, this court would owe "substantial deference" to a foreign nation's interpretation of its own laws. *See In Re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992).

9. Plaintiff has submitted evidence which tends to show, at the least, that their affiliates believe compliance is unlawful and are refusing to provide the demanded documents. Recognition of impossibility as an excuse for non-performance is a long-standing tenet of our justice system. There are numerous cases which stand for the proposition that a sanction imposed for failing to produce information due to inability violates our notions of fundamental fairness and due process. *See e.g., Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 212 (1958); *and In re United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1369 (9th Cir. 1980).

strict compliance with HVIRA's disclosure requirements. Defendant persists in the position that the first, last, and only constitutional question in this case is the rational basis test. There are, however, other limitations on a state's power. The state cannot, for example, impose conditions on doing business in California which require relinquishment of constitutional rights. *See generally* Laurence H. Tribe, *American Constitutional Law* § 11.5 at 781 (2d ed. 1988) ("Independently unconstitutional conditions — those that make enjoyment of a benefit contingent on sacrifice of an independent constitutional right — are invalid."). *See also Barron v. Burnside*, 121 U.S. 186, 200 (1887) ("In all the cases in which this court has considered the subject of the granting by a state to a foreign corporation of its consent to do business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution."); *Terral v. Burke Constr. Co.*, 257 U.S. 529, 532-533 (1922) ("[T]he sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law."); *and Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (simply denominating governmental interest as "business regulation" does not immunize it from constitutional challenge).

At oral argument and in its papers, defendant specifically referred to California's Insurance Holding Company System Regulatory Act, ("IHCSRA"), arguing that it establishes that California has an existing, presumably constitutionally permissible, public policy of requiring insurance companies to report information pertaining to their foreign affiliates. Several ways in which this regulatory

statute is distinguishable from HVIRA bear mention. First, it seeks significantly narrower information, related only to the affiliates' financial viability. Second, it specifically provides that the disclosed information shall be treated as confidential and shall not be made public by the Commissioner. Third, and most notably, it provides a forum within which insurers can present factual defenses to a failure to disclose "allegation" against them, and specifically dictates that an insurer will be given "notice and an opportunity to be heard" before the Commissioner acts to suspend, revoke, or refuse to renew a license for non-compliance with the disclosure requirements. *See* California Insurance Code § 1215 *et seq.* In short, IHCSRA is in many ways exactly what HVIRA is not. Its existence in no way establishes that HVIRA is constitutional, and it certainly does not support defendant's implied argument that the state's "licensure" power somehow trumps the requirements of procedural due process.

e. *Conclusion*

By providing that no state shall "deprive any person of life, liberty, or property without due process of law," the Fourteenth Amendment of our Constitution binds the fundamental protections of life, liberty, and property together into one concept. We need look no further than the factual background of this case to understand why these three protections are so joined.

Ever since the Fourteenth Amendment was enacted in 1866, courts have struggled to define precisely what it means to protect our property interests with "due process."

One tenet of this area of jurisprudence is clear, however: a state may not "make any thing due process of law" by merely declaring it to be so. *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877). The power of a state is not unchecked, and it is not absolute. Neither does it become so, as the Commissioner has argued here, under the cloak of some "licensure" power. It does not even become so if the power is wielded out of the purest intention to somehow right one of humanity's wrongs, or to facilitate some amount of redress for the victimized.

By mandating license suspension for non-performance of what may be impossible tasks without allowing for a meaningful hearing, HVIRA deprives plaintiffs of a protected property interest without affording them due process of law. Plaintiffs' joint motion for summary judgment that the HVIRA is unconstitutional under the Due Process Clause must therefore be granted.

IV. *Other Grounds for Summary Judgment*

Plaintiffs have also argued that the statute is unconstitutional for various other reasons, including that it is unconstitutionally vague. Because the court finds that the statute violates the Due Process Clause, and because, following the guidance of the Ninth Circuit's remand, the parties have focused their development of the factual record on due process issues, the court does not reach the other constitutional challenges raised by plaintiffs.

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Also, defendant moves for summary judgment on the ground that HVIRA is not constitutional for any other reason raised in any plaintiffs' complaint.[10] Because the court finds that the statute is unconstitutional on due process grounds, the court need not render advisory opinions on defendant's arguments that the statute passes other constitutional tests. Defendant's motion for summary judgment will therefore be denied on the ground that the statute violates due process.

IT IS THEREFORE ORDERED that plaintiffs' motions for summary judgment upon the ground that HVIRA violates due process be, and the same hereby are, GRANTED. Defendant is hereby permanently enjoined from suspending the licenses of the plaintiffs to do business in California based on their failure to comply with the Holocaust Victim Insurance Relief Act and its accompanying regulations.

IT IS FURTHER ORDERED that defendant's motion for summary judgment upon the ground that HVIRA is not unconstitutional be, and the same hereby is, DENIED.

DATED: October 1, 2001

s/ William B. Shubb
William B. Shubb
UNITED STATES DISTRICT JUDGE

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10. Defendant's original moving papers addressed all of plaintiffs' constitutional challenges except the due process argument raised by the Generali plaintiffs concerning the Commissioner's allegedly unconstitutional "campaign" against Generali.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED FEBRUARY 7, 2001

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00-16163

D.C. No.
CV-00-00506-WBS

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. — U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL LIFE INSURANCE COMPANY; GERLING AMERICA INSURANCE COMPANY; and CONSTITUTION INSURANCE CORP.,

Plaintiffs-Appellees,

v.

HARRY W. LOW,* in his capacity as the COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA,

Defendant-Appellant.

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* Harry W. Low is substituted for his predecessor as Commissioner of Insurance for the State of California. Fed. R. App. P. 43(c)(2).

Appendix C

No. 00-16164

D.C. No.
CV-00-00875-WBS

ASSICURAZIONI GENERALI,

Plaintiff-Appellee,

v.

HARRY W. LOW, individually, and in his capacity as the INSURANCE COMMISSIONER for the STATE OF CALIFORNIA,

Defendant-Appellant.

No. 00-16165

D.C. No.
CV-00-00779-WBS

WINTERTHUR INTERNATIONAL AMERICA INSURANCE COMPANY, WINTERTHUR INTERNATIONAL AMERICA UNDERWRITERS INSURANCE COMPANY; GENERAL CASUALTY COMPANY OF WISCONSIN; REGENT INSURANCE COMPANY; REPUBLIC INSURANCE COMPANY; SOUTHERN INSURANCE COMPANY, UNIGARD INDEMNITY COMPANY; UNIGARD INSURANCE COMPANY; and BLUE RIDGE INSURANCE COMPANY,

Plaintiffs-Appellees,

v.

Appendix C

HARRY W. LOW, in his capacity as INSURANCE COMMISSIONER for the STATE OF CALIFORNIA,

Defendant-Appellant.

No. 00-16182

D.C. No.
CV-00-00613-WBS

AMERICAN INSURANCE ASSOCIATION and AMERICAN RE-INSURANCE COMPANY,

Plaintiffs-Appellees,

v.

HARRY W. LOW, in his capacity as INSURANCE COMMISSIONER for the STATE OF CALIFORNIA,

Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted
January 9, 2001—San Francisco, California

Filed February 7, 2001

Before: Alfred T. Goodwin, Susan P. Graber, and
Richard A. Paez, Circuit Judges.

Opinion By Judge Graber

Appendix C

OPINION

GRABER, Circuit Judge:

Plaintiffs are three insurance companies and one trade organization of insurance companies who do business in California. They sued the California Commissioner of Insurance (Commissioner) seeking declaratory and injunctive relief to bar enforcement of the Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code §§ 13800-13807 (1999). The district court issued a preliminary injunction after ruling that Plaintiffs had established a likelihood of irreparable harm and a probability of success on the merits of the questions whether HVIRA violates the Commerce Clause and whether it violates the federal government's "foreign affairs" power. The Commissioner brings this appeal. We leave the preliminary injunction in place, but for reasons different than those expressed by the district court.

FACTUAL AND PROCEDURAL HISTORY

HVIRA requires insurers that do business in California and that sold insurance policies, in effect between 1920 and 1945 (Holocaust-era policies), to persons in Europe to file certain information about those policies with the Commissioner.[1] Cal. Ins. Code § 13804(a). The reporting

1. The information that the insurance companies must provide is: (1) the number of insurance policies; (2) the holder, beneficiary, and current status of each policy; and (3) the city of origin, domicile, or address for each policyholder listed in each policy. Cal. Ins. Code § 13804(a)(1)-(3). In addition, the insurer must certify that: (1) the (Cont'd)

requirement also applies to insurance companies that do business in California and are "related" to a company that sold Holocaust-era policies, even if the relationship arose after the policies were issued. *Id.* A "related company" is any "parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer." *Id.* § 13802(b). HVIRA requires the Commissioner to store the information in a public "Holocaust Era Insurance Registry." *Id.* § 13803. The Commissioner must "suspend the certificate of authority to conduct insurance business in the state of any insurer that fails to comply" with HVIRA's reporting requirements. *Id.* § 13806.

Plaintiffs filed four separate actions against the Commissioner, in which they sought to enjoin enforcement of HVIRA. The actions were brought by: (1) Gerling Global Reinsurance Corp. of America and its affiliates (collectively, Gerling), who are, according to their complaint, "arguably 'affiliated' [with] . . . or 'related [to]' " two German insurers that issued Holocaust-era policies; (2) American Insurance Association (AIA), a nonprofit trade association of insurers

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(Cont'd)

proceeds of the policies were paid; or (2) the beneficiaries or heirs could not be located after diligent search, and the proceeds were distributed to Holocaust survivors or charities; or (3) a court of law has certified a plan for distributing the proceeds; or (4) the proceeds have not been distributed. *Id.* § 13804(b)(1)-(3). The implementing regulations state that, if "the insurer states that it has no actual policies to report because the records are no longer in the possession of the insurer or its related company(ies), it shall provide a complete explanation of that statement." Cal. Code Regs. tit. 10, § 2278.2(a) (2000). Any insurer who knowingly files false information is subject to a penalty of up to $5,000. Cal. Ins. Code § 13805.

whose member-insurers are required to report under HVIRA, and American Re-insurance Company, a wholly owned subsidiary of a German corporation "that has investment interests in European insurance companies that do issue insurance policies"; (3) Winterthur International America Insurance Company, its affiliates, and numerous other insurance and underwriting companies (collectively, Winterthur), who are "arguably 'related companies' . . . with more than forty insurance companies currently located in Europe"; and (4) Assicurazioni Generali (Generali), an Italian insurance company that issued Holocaust-era policies and currently does business in California. The district court determined that the four cases were "related" within the meaning of Eastern District of California Local Rule 123(a) and assigned the cases to the same judge, but did not consolidate them.

Plaintiffs sought declaratory and injunctive relief, claiming that HVIRA violates the Commerce Clause, the Due Process Clause, the Equal Protection Clause, and the foreign affairs power. Gerling also asked the court to review two statutes that were enacted at the same time as HVIRA: (1) California Code of Civil Procedure § 354.5 (1999), which allows California residents to bring claims for the payment of Holocaust-era insurance policies and extends the statute of limitations on such claims until December 31, 2010; and (2) California Insurance Code § 790.15 (1999), which requires the Commissioner to suspend the certificate of authority of any insurer who has failed to pay on valid Holocaust-era policies. The Commissioner filed a motion to dismiss in which he argued that Gerling did not have standing to challenge California Code of Civil Procedure § 354.5 or

California Insurance Code § 790.15. The district court granted the motion, ruling that Gerling had not established an imminent threat of prosecution under those statutes. Gerling does not challenge that holding.

Plaintiffs all filed motions for a preliminary injunction. The district court granted their motions, holding that "plaintiffs have established a probability of success under the foreign affairs doctrine and the Commerce Clause." The court did not rule on Plaintiffs' other grounds for relief. The district court also held that Plaintiffs had established the likelihood of irreparable injury.

The Commissioner timely appealed the district court's orders in all four cases. We have jurisdiction under 28 U.S.C. § 1292(a)(1). Because these cases all involve the same legal issues, we consider them together.

STANDARD OF REVIEW

We review for abuse of discretion the grant of a preliminary injunction. *FDIC v. Garner,* 125 F.3d 1272, 1276 (9th Cir. 1997). A district court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Roe v. Anderson,* 134 F.3d 1400, 1402 (9th Cir. 1998).

DISCUSSION

A. *The Standard for Issuing a Preliminary Injunction*

"To obtain a preliminary injunction, a party must establish either: (1) probable success on the merits and irreparable

injury, or (2) sufficiently serious questions going to the merits to make the case a fair ground for litigation with the balance of hardships tipping decidedly in its favor." *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir. 1998). The two alternatives represent two points on a sliding scale. *Roe*, 134 F.3d at 1402. The district court held that Plaintiffs' actions fell within the first category. The Commissioner does not dispute the district court's finding of irreparable injury; rather, he questions whether the district court abused its discretion in ruling that Plaintiffs established a probability of success on the merits.

The district court's reasoning implies that Plaintiffs demonstrated a probability of success on their claim that HVIRA is unconstitutional on its face. The court did not make individualized findings of irreparable injury, nor did it discuss either constitutional claim in the context of a particular Plaintiff. As presented in this appeal, Plaintiffs' challenges to HVIRA involve issues of law only.

B. *The Commerce Clause Claim*

As noted, the district court held that Plaintiffs established a probability of success that HVIRA violates the Commerce Clause. We disagree and hold that the district court based its conclusion on an erroneous view of the law.

1. *The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1014 (1945) (McCarran Act)*

In *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944), the Supreme Court held that the "business of insurance" fell within Congress' power to

regulate interstate commerce. That holding conflicted with the previous understanding of the relationship between the business of insurance and the Commerce Clause; before 1944, the Court had implied that the states could regulate the insurance industry without federal interference. *See Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 414-16 (1946) (discussing the history of insurance regulation and the Commerce Clause).

The McCarran Act was Congress' response. *Id.* Title 15, § 1011 of the McCarran Act states:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Section 1012(a) provides that the "business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business." The phrase "business of insurance" refers to "the relationship between the insurance company and the policyholder" and includes "the fixing of rates[,] . . . [t]he selling and advertising of policies, and the licensing of companies and their agents." *SEC v. National Sec., Inc.,* 393 U.S. 453, 460 (1969) (citations omitted).

2. *The McCarran Act Applies to HVIRA*

Plaintiffs argue, and the district court held, that the McCarran Act does not apply to HVIRA because it is an impermissible "extraterritorial" regulation, as discussed by the Supreme Court in *FTC v. Travelers Health Ass'n*, 362 U.S. 293 (1960), and by this court in *Ace Check Cashing, Inc. v. Aetna Casualty & Surety Co. (In re Insurance Antitrust Litigation)*, 938 F.2d 919 (9th Cir. 1991), *aff'd in part, rev'd in part sub nom. Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993). Neither *Travelers* nor *In re Insurance* applies to the present dispute, however.

Travelers and *In re Insurance* involved the interpretation of § 1012(b) of the McCarran Act, which instructs courts not to construe any other federal statute as preempting a state insurance regulation unless there is a clear statement from Congress to do so. Section 1012(b) reads in part: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance [.]" Section 1012(b) also provides that the Sherman Act, the Clayton Act, and the Federal Trade Commission (FTC) Act *do* apply to the "business of insurance," but only "to the extent that such business is not regulated by State law."

The Supreme Court in *Travelers* and this court in *In re Insurance* held that Congress did not intend to shield an insurance company from federal regulation if one state expressly regulated an insurance company's conduct, but the conduct that the federal government sought to regulate

occurred in a different state. In *Travelers,* a Nebraska statute prohibited Nebraska insurance corporations from engaging in unfair trade practices "in any other state." 362 U.S. at 296. A Nebraska insurance corporation argued that the Nebraska statute precluded the FTC, under § 1012(b) of the McCarran Act, from regulating conduct of the insurance corporation that occurred outside Nebraska. The Supreme Court disagreed, concluding that Congress did not intend for the "law of a single State [to take] from the residents of every other State the protection of the" FTC Act. *Id.* at 298.

The Court observed that Congress had delegated its power to regulate insurance because it believed that insurance regulation was a local matter. *Id.* at 302. The Court reasoned that the insurance company's argument would subvert the McCarran Act; if one state had a fair-trade statute that purported to regulate nationwide, an insurance company located there would be free from the reach of the FTC Act in every other state. The Court's interpretation of 15 U.S.C. § 1012(b) avoided this absurd result.

Similarly, in *In re Insurance,* this court applied *Travelers* to reject the notion that Congress intended for the antitrust law of a single state to preclude application of the Sherman Act to insurers' conduct that occurred in other states. *In re Insurance,* 938 F.2d at 928. We noted that "[s]tate insurance schemes do not, and could not, purport to regulate the bulk of international insurance transactions." *Id.* (citation and internal quotation marks omitted).

In neither case did the court evaluate the constitutionality under the Commerce Clause of the state act that attempted to regulate "extraterritorially." Instead, both cases involved

statutory interpretation. The courts merely held that, irrespective of the constitutional limits of a state's power to regulate extraterritorially, Congress did not intend for the regulatory scheme of one state to protect the citizens of all other states and thereby eliminate the need for federal regulation.

There is a second important distinction between the two cited cases and the present dispute: the difference between HVIRA and the state laws considered in *Travelers* and *In re Insurance.* In those cases, the state laws sought to regulate directly the conduct of an insurer in another jurisdiction. By contrast, HVIRA seeks only to obtain information about conduct in another jurisdiction, without affecting directly any of that conduct. For those two reasons, neither *Travelers* nor *In re Insurance* answers the question that we face.

The district court's holding that the McCarran Act does not apply to HVIRA also rested on its belief that HVIRA must be viewed as a part of California's overall plan to force foreign insurance companies to settle insurance claims with California's residents. The district court cited HVIRA's legislative findings and declarations and held that HVIRA encourages the resolution of claims concerning Holocaust-era policies "through an international process" and thus attempts to "regulate the decision making authority of European insurance companies to pay or not to pay claims on European policies." That reasoning mischaracterizes HVIRA as a matter of law.

HVIRA, by its terms, does not regulate "the decision making authority of European insurance companies to pay or not to pay claims on European policies" in any way.

Appendix C

HVIRA requires California companies only to *provide information* about Holocaust-era insurance policies that they (or any of their affiliates) issued.

A second and separate statute, California Code of Civil Procedure § 354.5, allows California residents to bring claims for payment of Holocaust-era insurance policies. A third statute, California Insurance Code § 790.15, authorizes the Commissioner to suspend the licenses of insurance companies who have not paid valid Holocaust-era claims. The district court dismissed Gerling's action challenging the validity of those two provisions because Gerling lacked standing. In short, the question of the validity of those two statutes must remain for another day.

It is true that, by enacting HVIRA, California's legislature intended to help California residents recover on unpaid policies that were entered into in foreign countries by giving them access to information. It also is likely that California's legislature simply intended to protect its residents from insurance companies that have not paid valid insurance claims.[2] In any event, however, the legislature's stated purpose in enacting a statute is not dispositive of a dormant Commerce Clause challenge. The Commerce Clause seeks to prevent extraterritorial economic "effects," not purposes. *See Healy v. Beer Institute,* 491 U.S. 324, 336 (1989) ("The

2. The state requests information from foreign insurers in other contexts, too. For example, California Insurance Code § 699.5 (1994) requires insurers that are owned, operated, or controlled by other governments to provide information so that the Commissioner can determine whether "the insurer is subject to any form of subsidy that would enable it to compete unfairly with domestic insurers."

critical inquiry is whether the *practical effect* of the regulation is to control conduct beyond the boundaries of the State." Extraterritorial regulation "is invalid regardless" of the intent of the enacting legislature.) (emphasis added); *Birth Hope Adoption Agency, Inc. v. Arizona Health Care Cost Containment Sys.*, 218 F.3d 1040, 1044 (9th Cir. 2000) ("The first step in evaluating state regulatory measures under the dormant Commerce Clause is to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce.") (citations and internal quota-tion marks omitted).

HVIRA's reporting requirements might force a "related" company of a California business to search for information, but that is the extent of HVIRA's "extraterritorial" reach. HVIRA, on its face, does not regulate foreign insurance policies, or control the substantive conduct of a foreign insurer, or otherwise affect "the business of insurance" in any other country.

In conclusion, Congress has expressly delegated to the states the power to regulate insurance, free from the constraints of the dormant Commerce Clause. The Supreme Court has noted that the "licensing of companies" is part of the "business of insurance" and is covered by the McCarran Act.[3] *National Sec.*, 393 U.S. at 460. HVIRA is a California insurance regulation of California insurance companies that

3. Plaintiffs implicitly recognize that HVIRA regulates the "business of insurance." Seeking information from insurers about their claims-paying record, to be used in the licensing process, is a form of regulating the business of insurance.

affects foreign commerce only indirectly. Consequently, the McCarran Act applies and the dormant Commerce Clause does not. *See Benjamin*, 328 U.S. at 430-31 (noting that Congress, through the McCarran Act, "clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for").

3. *HVIRA Does Not Impede the Federal Government's Ability to Speak With "One Voice" on a Matter Affecting Foreign Commerce*

HVIRA touches on foreign commerce because of the indirect effect described above. The question remains whether that fact provides an independent reason to hold that Plaintiffs have established a probability that HVIRA is unconstitutional. The answer is "no."

The Supreme Court confronted a similar issue in *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994). There, the Court considered whether California's worldwide-reporting tax system violated the dormant Commerce Clause. The Supreme Court, after noting that the California tax was constitutional under typical dormant Commerce Clause analysis, evaluated whether the tax's effect on *foreign* commerce impaired the federal government's ability to speak with "one voice." *Id.* at 328. The Court held that it did not. *Id.*

The Court noted that Congress had considered, and eventually rejected, legislation that would have precluded state statutes like the one in dispute in *Barclays*. *Id.* at 324-28. The Court reasoned that Congress was willing "to tolerate" the states' worldwide-reporting tax statutes. *Id.* at 327. Significantly, the Court then observed that "the foreign policy of the United States . . . [is] much more the province of the Executive Branch and Congress than of this Court"; therefore, the foreign companies' argument that the California statute "is unconstitutional because it is likely to provoke retaliatory action by foreign governments is directed to the wrong forum." *Id.* at 327-28 (citation and internal quotation marks omitted).

Similarly, in *Wardair Canada, Inc. v. Florida Department of Revenue,* 477 U.S. 1 (1986), the Court evaluated whether a Florida tax on airline fuel, which increased the tax liability of foreign airlines, prevented the federal government from speaking with "one voice." The Court concluded that the Florida tax did not violate the Commerce Clause. *Id.* at 12-13. The federal government had entered into more than 70 bilateral aviation agreements, none of which purported to *preclude* the type of tax enacted by Florida. The Court reasoned: "By negative implication . . . , the United States has at least acquiesced" in the type of statute enacted by Florida. *Id.* at 12. Moreover, "[i]t would turn dormant Commerce Clause analysis upside down to apply it where the Federal Government has acted, and to apply it in such a way as to *reverse* the policy that the Federal Government has elected to follow. . . . [T]he Federal Government is entitled in its wisdom to act to permit the States varying degrees of regulatory authority." *Id.* (emphasis in original).

Appendix C

Barclays and *Wardair Canada* teach that, before we can hold that an otherwise constitutional state statute[4] that affects foreign commerce is unconstitutional because it prevents the federal government from speaking with "one voice," we must examine whether the federal government has *chosen* to permit the states to act. After conducting that examination, we hold that Congress has spoken affirmatively in the area of Holocaust-era insurance policies and has acquiesced in state laws like HVIRA.[5]

In 1998, Congress passed the U.S. Holocaust Assets Commission Act of 1998 (Holocaust Act), Pub. L. 105-186, 112 Stat. 611, as amended Pub. L. 106-155, § 2, 113 Stat. 1740 (1999) (codified at 22 U.S.C. § 1621 note), in order "to establish a commission to examine issues pertaining to the disposition of Holocaust-era assets in the United States . . . and to make recommendations to the President on further action, and for other purposes." Holocaust Act Intro. The Holocaust Act instructs the Commission to "conduct a thorough study and develop a historical record of" certain assets, "if such assets came into the possession or control of the Federal Government." *Id.* § 3(a)(1). The

4. In both *Barclays* and *Wardair Canada*, the state statute was "otherwise constitutional" because it did not discriminate against interstate commerce, while in the present case HVIRA is "otherwise constitutional" because of the McCarran Act.

5. A much stronger case for congressional acquiescence exists here than in *Wardair Canada* or *Barclays*. In those cases, the Court inferred congressional acquiescence by negative implication. In the present case, however, we need not draw a negative inference from what Congress did *not* say, but can draw a positive inference from what Congress *did* say in the Holocaust Act.

Commissioner and Amicus the State of California argue that § 3(a)(4), which concerns Holocaust-era insurance policies, is relevant to this litigation:

> In carrying out its duties under this Act, the Commission shall take note of the work of the National Association of Insurance Commissioners with regard to Holocaust-era insurance issues and shall encourage the National Association of Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign, doing business in the United States at any time after January 30, 1933, that issued any individual life, health, or property — casualty insurance policy to any individual on any list of Holocaust victims. . . .

Id. § 3(a)(4)(A). The report by the National Association of Insurance Commissioners (NAIC) "should include the following, to the degree the information is available": (1) the number of policies issued by insurance companies to victims of the Holocaust; (2) the value of each policy at the time of issue; (3) the total number of policies, and the dollar amounts, that have been paid out; and (4) the total present-day value of assets in the United States of each company. *Id.* § 3(a)(4)(B). Section 3(a)(3), entitled "Coordination of Activities," states that the Commission "shall, to the maximum extent practicable, coordinate its activities with, and not duplicate similar activities already being undertaken by, private individuals, private entities, or *government entities,* whether *domestic* or foreign." (Emphasis added.) Section 3(b) adds that the

Commission "shall review comprehensively any *research by . . . non-Federal government entities,* whether *domestic* or foreign." (Emphasis added.)

The Holocaust Act does not refer in so many words to state legislation as a cause of domestic governments' undertaking this "research," § 3(b), nor does it explain what "work" of NAIC the Commission is to take "note" of, § 3(a)(4). There are several reasons, however, why we read the Holocaust Act to embrace state legislation like HVIRA.

NAIC is an organization of insurance regulators from the 50 states. The Holocaust Act asks for detailed information on the Holocaust-related claims practices of "*all insurance companies, both domestic and foreign,* doing business in the United States at any time after January 30, 1933." *Id.* § 3(a)(4)(A) (emphasis added). This information is to include data on individual Holocaust-era policies. *Id.* If Congress was expecting a detailed report on the claims practices and policies of "foreign" insurance companies from an organization consisting only of state insurance regulators, Congress must have expected that the regulators would be acting pursuant to state law. Congress must also have been aware that, in order to fulfill the Holocaust Act's broad objectives, state insurance commissioners might have to require the foreign affiliates of domestic insurance companies to search a foreign office for information on Holocaust-era policies.

Even if Congress' reference to the "work" of NAIC is not, by itself, encouragement of state statutes like HVIRA, Congress was aware that domestic governmental entities were

conducting research into the activities of Holocaust-era insurers. As noted, § 3(b) of the Holocaust Act requires the Commission to "review comprehensively any research by . . . *non-Federal government entities,* whether domestic or foreign" (emphasis added), and § 3(a)(3) requires the Commission to "coordinate its activities" with those of domestic governmental entities.

The legislative history of the Holocaust Act supports our conclusion that Congress was aware of the states' efforts to obtain information on Holocaust-era insurance policies. In 1998, there was a flurry of activity in Congress relating to Holocaust-era assets. On February 12, 1998, the House Committee on Banking and Financial Services held a hearing on "The Restitution of Art Objects Seized by the Nazis from Holocaust Victims and Insurance Claims of Certain Holocaust Victims and Their Heirs": Hearing Before the House Comm. on Banking & Fin. Servs., 105th Cong. 131 (Feb. 12, 1998).

State Insurance Commissioners Quackenbush (of California) and Senn (of Washington) testified at that hearing. Commissioner Senn noted that she chaired the NAIC "Holocaust Insurance Issues Working Group," which was investigating Holocaust-era insurance issues with the help of "state insurance departments." *Id.* 1998 WL 65380. She explained that NAIC had requested voluntary cooperation from the insurance companies but, "[i]f our requests for cooperation are not satisfied, then the states may begin to exercise [regulatory] powers." *Id.* "Congress and the States can work together," Commissioner Senn concluded. *Id.* 105th Cong. at 134. Commissioner Quackenbush added

that he had held hearings in California relating to this issue, and he was "prepared to revoke [the] certificate of authority, which allows a company to sell insurance in California, for [any insurance company] and any of its American subsidiaries, if it fails to" provide information on Holocaust-era policies. *Id.* at 142. The Chair of the House committee, Representative Leach, who sponsored the Holocaust Act two months later, noted:

> [L]et me say that because this is an issue of international significance, there are aspects of the American system that are not widely understood abroad, and one relates to the Federal nature of America, particularly in the insurance arena, *the decision of the United States Congress, in effect, either to devolve or not to assume responsibility for basic insurance regulation, which gives the States a significant role. And that means that as two symbolic State insurance commissioners, there's a great deal of authority that resides in your offices.*

Id. at 157 (emphasis added).[6] On the basis of the text, context, and history of the Holocaust Act, we conclude that Congress was aware of the states' involvement in this area and, at least implicitly, encouraged laws like HVIRA.

Notwithstanding the Holocaust Act, Plaintiffs argue, and the district court held, that HVIRA conflicts with a federal

6. Representative Leach submitted a draft of the bill, H.R. 3662, to the House on April 1, 1998. *See* 1998 Cong. Q. 3662, 105th Cong., 2d Sess.

policy relating to "Holocaust victims compensation efforts" as evidenced by three actions undertaken by the executive branch. They are: (1) the Foundation Agreement between Germany and the United States (Foundation Agreement); (2) the International Commission on Holocaust Era Insurance Claims (ICHEIC); and (3) the Swiss-US Joint Statement. The following is a brief summary of each:

a. *The Foundation Agreement*

In December 1999, the German government and German companies agreed to fund a DM 10 Billion Foundation to settle Nazi-era claims, in exchange for the voluntary dismissal of lawsuits that had been filed against German companies. The German government has agreed to fund the Foundation when all such claims pending in United States courts have been finally dismissed.

On July 17, 2000, the United States and the German government signed the Foundation Agreement. The Agreement recognizes "as legitimate the interest German companies have in all-embracing and enduring legal peace." It also states that "it would be in the interests of both parties for the Foundation to be the exclusive remedy and forum for addressing all claims[ ] that have been or may be asserted against German companies" arising from Nazi-era activities. Foundation Agreement at 2, 4.

The United States, in Article 2 of the Foundation Agreement, agreed to the following in pertinent part:

> (1) The United States shall, in all cases in which the United States is notified that a claim described

> in article 1(1) has been asserted in a court in the United States, inform its courts through a Statement of Interest . . . that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims asserted against German companies . . . and that dismissal of such cases would be in its foreign policy interest.
>
> (2) The United States, recognizing the importance of the objectives of this agreement, including all-embracing and enduring legal peace, shall, in a timely manner, use its best efforts, in a manner it considers appropriate, to achieve these objectives with state and local governments.

Annex B of the Foundation Agreement explains that the United States will "recommend dismissal" of lawsuits "on any valid legal ground." Paragraph seven of Annex B recognizes, however, that the "United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal, but will reinforce the point that U.S. policy interests favor dismissal on any valid legal ground."

b. *The ICHEIC*

The ICHEIC was established in 1998 by NAIC in cooperation with several European insurance companies, European regulators, representatives of nongovernmental organizations, and the State of Israel. The United States has the status of an "observer." The ICHEIC is a voluntary,

private organization that was created with the goal of implementing a "just process . . . that will expeditiously address the issue of unpaid [Holocaust-era] insurance policies." The ICHEIC creates an "International Commission" that is charged with initiating an "investigatory process to determine the current status of those insurance policies . . . for which claims are filed." To assess the remaining unpaid insurance policies of Holocaust victims, "a reasonable review will be made of the participating companies' files."

c. *The Swiss-US Joint Statement*

At the inaugural meeting of the Swiss-US Joint Economic Commission in January 2000, the two countries issued a Joint Statement stating that they "[h]ave decided to endow their partnership with a long-lasting perspective, through continued and institutionalized dialogue." Section 2.4(b) of an "Action Plan" annexed to the Joint Statement notes that many Swiss insurance companies have settled insurance lawsuits, and "U.S. authorities will call on the U.S. State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers."

We next consider the effect of those three actions on the validity of HVIRA. Significantly, Plaintiffs do not argue that HVIRA is preempted by any of the three. Instead, Plaintiffs claim that the three actions simply are evidence of a foreign policy with which HVIRA conflicts. We are not persuaded.

Appendix C

First, we question whether there is in fact any policy conflict between HVIRA, the enactment of which Congress encouraged in the federal Holocaust Act, and the executive branch initiatives. HVIRA seeks information for two main purposes: enabling victims of the Holocaust to know whether they have insurance claims, and protecting Californians from insurers that have not paid valid claims. The second purpose conflicts with no federal policy of which we are aware. The first is consistent with the overall goal of the three initiatives: to resolve Holocaust-era claims. In other words, the Holocaust Act, HVIRA, and the executive branch initiatives share the same policy objective, although they seek to achieve that policy objective by varying techniques.

Second, we note that two of the executive branch initiatives are country-specific. The German Foundation Agreement pertains to German insurers. The Swiss-US Joint Statement pertains to Swiss insurers. That being so, neither of those initiatives governs with respect to Generali (an Italian insurer) or Winterthur (which apparently has affiliates throughout Europe).

Third, as Plaintiffs concede, none of the three initiatives has preemptive effect. The German Foundation Agreement mentions the United States' interest in the *voluntary* dismissal of lawsuits against German corporations and, by its terms, "does not suggest that [the United States'] policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal" of any lawsuit. Foundation Agreement, Annex B, ¶ 7. The ICHEIC is not an official executive branch action at all; it is a *voluntary, private* organization in which the United States has the role of a mere observer.

Of the three, only the Swiss-US Joint Statement refers specifically to a policy on gathering information about Holocaust-era insurance policies: the executive branch "will call on the U.S. State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers." Swiss-US Joint Statement, Action Plan § 2.4(b). That is hortatory, not mandatory, wording. But even if we were to assume that a conflict exists between the Holocaust Act and the Swiss-US Joint Statement with regard to seeking information from Swiss insurers,[7] Congress' action controls in this instance. Article I, § 8 of the United States Constitution expressly grants Congress the authority to regulate foreign commerce. Article II, § 2 of the Constitution grants the executive branch the authority, with the consent of the Senate, to make treaties but, as noted, the Swiss-US Joint Statement is not a treaty, and preemption is not an issue here. Plaintiffs' argument that a "policy interest" found in an executive branch "Joint Statement" creating an Economic Commission trumps Congress' express constitutional authority to regulate foreign commerce is incorrect.[8]

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7. It is unclear from the Swiss-US Joint Statement what "investigative initiatives" by "State legislative bodies" are considered to be "*unwarranted*." (Emphasis added.) By implication, states may seek information if the inquiry is "warranted." Arguably, the Holocaust Act is a statement from Congress that statutes like HVIRA are warranted.

8. *Cf.* Louis Henkin, Foreign Affairs and the U.S. Constitution 89 (2d ed. 1996) ("Whatever, then, the President might have authority to do by treaty or other international agreement, he cannot unilaterally regulate commerce with foreign nations. . . .").

In this connection, Plaintiffs draw our attention to letters in which executive branch officials argue that HVIRA does conflict with the federal government's policy concerning Holocaust-era claims. In *Barclays,* the Supreme Court rejected a similar argument. The plaintiff in *Barclays* had pointed to "a series of Executive Branch actions, statements, and amicus filings . . . that, taken together, . . . constitute a clear federal directive proscribing States' use of worldwide combined reporting." 512 U.S. at 328 (citation and internal quotation marks omitted). The Court held that the executive branch's actions "cannot perform the service for which [the plaintiff] would enlist them. The Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.' " *Id.* at 328-29 (quoting U.S. Const. art. I, § 8, cl. 3).

In conclusion, the district court erred when it held that Plaintiffs established a likelihood of success on the question whether HVIRA violates the Commerce Clause.

C. *The Foreign Affairs Power*

The district court also held that Plaintiffs established a probability of success on their claim that HVIRA violates the federal government's power over foreign affairs. The court reasoned, and Plaintiffs argue, that HVIRA has more than an "incidental effect on foreign countries" and has the potential to "disrupt and embarrass" the federal government in the field of foreign relations. We disagree as a matter of law.

Appendix C

1. *Relevant Law*

The federal government's foreign affairs power is not mentioned expressly in the text of the Constitution but, rather, is derived from the structure of the Constitution and the nature of federalism.[9] *See generally* Harold G. Maier, *Preemption of State Law: A Recommended Analysis,* 83 Am. J. Int'l L. 832, 836-37 (1989). The power is rarely invoked by the courts; the Supreme Court has not applied it in more than 30 years, since *Zschernig v. Miller,* 389 U.S. 429 (1968).

The plaintiff in *Zschernig* challenged an Oregon probate law that allowed a foreign citizen to inherit from a decedent's estate only if United States citizens could inherit from a decedent's estate in the foreign citizen's country. The Supreme Court had held in *Clark v. Allen,* 331 U.S. 503, 517 (1947), that a California probate law with a similar reciprocity provision did not, on its face, violate the Constitution, because the statute had only "some incidental or indirect effect in foreign countries." In *Zschernig,* the Court refused to reconsider its facial holding in *Clark,* but held that Oregon's statute, *as applied,* was an unconstitutional "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." 389 U.S. at 432-33.

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9. The foreign affairs power also has been referred to as "dormant foreign relations preemption." Curtis A. Bradley & Jack L, Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position,* 110 Harv. L. Rev. 815, 864 (1997); *see also* Harold Hongju Koh, *Is International Law Really State Law?,* 111 Harv. L. Rev. 1824, 1847 (1998).

Appendix C

The Court in *Zschernig* pointed, with disapproval, to many examples of judges' pontificating on the policies of foreign nations. *Id.* at 433-34. The Court concluded that "the type of probate law that Oregon enforces affects international relations in a persistent and subtle way." *Id.* at 440. The Court observed that " 'international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.' " *Id.* at 441 (quoting *Hines v. Davidowitz,* 312 U.S. 52, 64 (1941)). Here, of course, we address a facial (*Clark*), not an as-applied (*Zschernig*) challenge.

The parties call our attention to two more recent cases in which other circuit courts have confronted a foreign affairs challenge. In *National Foreign Trade Council v. Natsios,* 181 F.3d 38, 51-52 (1st Cir. 1999), the First Circuit held that a Massachusetts law that prohibited state agencies from purchasing goods from companies doing business with a specific country, Burma (the Burma Law), violated the foreign affairs power, the dormant Commerce Clause, and the Supremacy Clause. Notably, the Supreme Court affirmed the First Circuit's ruling that the Burma Law was preempted by federal law under the Supremacy Clause, but the Court did not rule on the foreign affairs question. *Crosby v. National Foreign Trade Council,* 120 S. Ct. 2288, 2294-95 n.8 (2000).

In *Trojan Technologies, Inc. v. Pennsylvania,* 916 F.2d 903 (3d Cir. 1990), a Canadian corporation argued that a Pennsylvania "Buy American" law violated the foreign affairs power. The Third Circuit held that the statute did not violate the Commerce Clause, the Supremacy Clause, or the foreign

affairs power. The court reasoned that "any state law that involves the state in the actual conduct of foreign affairs is unconstitutional," but "any action that has only some incidental or indirect effect in foreign countries" is not. *Id.* at 913 (citation and internal quotation marks omitted). The court then held that the "Buy American" statute "exhibits none of the dangers attendant on the statute reviewed" in *Zschernig*, because: (1) Pennsylvania's statute provided no opportunity for state officials to comment on the nature of foreign regimes; (2) the Pennsylvania statute, on its face, did not single out any particular foreign country; (3) there was no evidence that the statute had been applied selectively according to attitudes concerning foreign policy; and (4) there was evidence that Congress had recently directed its attention to "Buy American" statutes, but did not take steps to preempt them.[10] *Id.* at 913-14; *see also K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 381 A.2d 774, 784 (N.J. 1977) (holding that New Jersey's "Buy American" statute did not violate the foreign affairs power because it did not "result demonstrably in a significant and direct impact upon foreign affairs"). *But see Bethlehem Steel Corp. v. Board of Comm'rs*, 276 Cal. App. 2d 221, 225-27 (Ct. App. 1969) (holding that a California "Buy American" statute violated the foreign affairs power).

2. *Zschernig Does Not Apply to HVIRA*

We are not persuaded that *Zschernig* applies to HVIRA. In *Zschernig*, the Oregon probate statute violated the foreign

10. The *Trojan* court's fourth reason echoes the reasoning of the foreign commerce cases, *Barclays* and *Wardair Canada*, discussed, in Part B(3), above.

affairs power because, *as applied,* it allowed Oregon judges to insult foreign nations. 389 U.S. at 433-35. In *Clark,* the Court held that a similar California statute, *on its face,* did not violate the Constitution. *See Zschernig,* 389 U.S. at 432 (noting that, in *Clark,* the Court held that "a general reciprocity clause did not on its face intrude on the federal domain"). HVIRA regulates insurance companies that do business in California and are, or are related to, companies that issued Holocaust-era insurance policies. No Plaintiff is a foreign government, nor is any Plaintiff owned in whole or in part by a foreign government; they are, simply, businesses. Unlike the statute considered in *Natsios,* HVIRA does not refer to any particular country. As in *Trojan,* there is no evidence that HVIRA would be applied in a way that would implicate the diplomatic concerns mentioned in *Zschernig.*

Because *Zschernig* has been applied so sparingly, because *Clark* remains intact, and because the Supreme Court's foreign commerce cases have taken a different approach (as we discussed above), we hesitate to apply *Zschernig* to a facial challenge to state statutes involving "foreign affairs" (a) but that mainly involve foreign commerce and (b) that are not directed at a particular country. HVIRA, on its face, involves commerce alone, and it is not, on its face, directed at any particular foreign country. For those reasons, we conclude that *Zschernig* does not govern.

D. *The Due Process Clause Claim*

Plaintiffs Generali and Winterthur argue that HVIRA violates the "legislative prong" of the Due Process Clause, which "limits the power of a forum state to apply its sub-

stantive law to factual and legal situations with which it has little or no contact." Additionally, Winterthur argues that HVIRA "violates the most basic notions of fundamental fairness" because it takes "away the licenses of California insurers for failure to perform tasks that are literally impossible." Moreover, Winterthur asserts, the reporting requirement is "arbitrary and irrational."

Plaintiffs cite a recent case, *Gerling Global Reinsurance Corp. v. Nelson,* 123 F. Supp. 2d 1298, 1303-04 (N.D. Fla. 2000), in which the District Court for the Northern District of Florida held that a Florida Holocaust-era insurance statute violates the legislative prong of the Due Process Clause. The court noted that, under Eleventh Circuit precedent, there must be " 'some minimal contact between a State and the regulated subject before it can, consistently with the requirements of due process, exercise legislative jurisdiction.' " *Id.* at 1301 (quoting *American Charities for Reasonable Fundraising Reg., Inc. v. Pinellas County,* 221 F.3d 1211, 1216 (11th Cir. 2000)).

It is possible that HVIRA violates the Due Process Clause, but the district court did not reach that issue, and it is not fully developed in the record or in the briefs presented to this court. We leave the preliminary injunction in place in order to give the district court an opportunity to consider whether Plaintiffs are likely to succeed on the merits.[11]

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11. Defendant acknowledged at oral argument that a serious question may exist concerning HVIRA and the Due Process Clause. When questioned about whether HVIRA requires that the Commissioner suspend the license of a California insurer who is

(Cont'd)

(Defendant does not challenge the district court's conclusion that Plaintiffs established a likelihood of irreparable harm; they may lose the right to continue to do business in California if the statute takes effect.)

CONCLUSION

We hold that the district court erred when it decided that HVIRA violates the dormant Commerce Clause and the foreign affairs power. However, because the district court has not addressed Plaintiffs' claim that HVIRA violates the Due Process Clause, we leave the preliminary injunction in place and remand for further proceedings.

Preliminary injunction AFFIRMED; REMANDED for further proceedings.

(Cont'd)

unable to produce the information required by HVIRA, either because of European privacy laws or because the company has no control over the information, counsel stated that HVIRA requires the suspension of the license nonetheless. Counsel then said that the issue "is really a due process issue" and that any evidence of a company's inability to produce information should be evaluated "as part of a due process analysis, and that's where we think that issue properly lies."

APPENDIX D — MEMORANDUM AND ORDER; PRELIMINARY INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED AND FILED JUNE 9, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NO. CIV. S-00-0506 WBS JFM

GERLING GLOBAL REINSURANCE CORP. OF AMERICA, et al.,

Plaintiffs,

v.

CHUCK QUACKENBUSH in his capacity as COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA,

Defendant.

NO. CIV. S-00-0613 WBS JFM

AMERICAN INSURANCE ASSOCIATION and AMERICAN RE-INSURANCE CO.,

Plaintiffs,

v.

CHUCK QUACKENBUSH in his capacity as COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA,

Defendant.

Appendix D

NO. CIV. S-00-0779 WBS JFM

WINTERTHUR INTERNATIONAL AMERICA INSURANCE CO., et al.,

Plaintiffs,

v.

CHUCK QUACKENBUSH in his capacity as COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA,

Defendant.

NO. CIV. S-00-0875 WBS JFM

ASSICURAZIONI GENERALI S.p.A.,

Plaintiff,

v.

CHUCK QUACKENBUSH in his capacity as COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA,

Defendant.

Appendix D

MEMORANDUM AND ORDER; PRELIMINARY INJUNCTION

In October 1999, California enacted the Holocaust Victim Insurance Relief Act ("HVIRA"). *See* Cal. Ins. Code §§ 13800-13807 and accompanying regulations, Cal. Code Regs. Tit. 10 §§ 2278-2278.5.[1] The stated purpose of the HVIRA is for insurance companies doing business in the State of California to ensure that "any involvement they or their related companies may have had with insurance policies of Holocaust victims are disclosed to the state and to ensure the rapid resolution of these questions, eliminating further victimization of these policyholders and their families." Cal. Ins. Code § 13801(e). Each set of plaintiffs has moved against defendant Chuck Quackenbush, the California Commissioner of Insurance, for a preliminary injunction against enforcement of the HVIRA and accompanying regulations on the grounds that they are unconstitutional and that such enforcement will cause plaintiffs irreparable harm. *See* Fed. R. Civ. P. 65.[2]

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1. Some of the plaintiffs use the term "HVIRA" to refer to all statutes related to California Insurance Code sections 13800-13807, including California Insurance Code section 790.15 and California Code of Civil Procedure section 354.5. In fact, the latter two sections were enacted before Insurance Code sections 13800-13807 and are not part of the HVIRA. When the court uses the term "HVIRA," it refers only to California Insurance Code sections 13800-13807 and the accompanying regulations.

2. Gerling additionally moves for a preliminary injunction against enforcement of California Civil Procedure Code section 354.5 and California Insurance Code section 790.15. The court dismisses Gerling's motion as to these two claims. (*See* Order re: Motion to Dismiss, filed

(Cont'd)

Appendix D

I. *Facts*

A. *The Statutes*

The disputed statutes and regulations relate to claims asserted by Holocaust victims or their heirs or beneficiaries for coverage under insurance policies issued in Europe between 1920-1945. After the National Socialist (NAZI) party came to power, it enacted a series of statutes authorizing governmental confiscation of Jewish property and other assets, including insurance proceeds. Under these NAZI statutes, German insurers were required to pay the proceeds of insurance policies of Jewish residents to "blocked accounts" controlled by the NAZI government. A 1943 statute ordered confiscation of the estates of deceased Jews. Further, although many Holocaust victims had insurance policies, many lost the papers during their imprisonment. In many cases, the persons most knowledgeable about the policy were killed, leaving heirs without a paper trail. As a result, many Holocaust victims and their descendants and heirs have never collected on insurance policies.

The HVIRA requires insurance companies doing business in California to file reports disclosing policies issued

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(Cont'd)

concurrently.) Hence, the court only considers the parties' motions for preliminary injunction against enforcement of the HVIRA.

Gerling also moves for summary judgment on the same claims discussed in its motion for preliminary injunction. Because discovery is incomplete, and defendant has not responded to that motion, the court does not consider it at this time. See Fed. R. Civ. P. 56(f).

in Europe during the period 1920-1945. *See* Cal. Ins. Code §§ 13800-13807. Other statutes extend the statute of limitations for filing such claims (Cal. Civ. Proc. Code § 354.5), and suspend the license of insurance companies who have not paid valid claims (Cal. Ins. Code § 790.15).

1. *California Insurance Code §§ 13800-13807 ("HVIRA")*

The HVIRA obligates insurers doing business in California to file reports identifying insurance policies (life, property, liability, health, annuities, dowry, educational, or casualty) sold to persons in Europe between 1920 and 1945 directly or through a "related company." Cal. Ins. Code § 13804(a). A "related company" is "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer." Cal. Ins. Code § 13802(b). Specifically, the statute requires the insurer or related company to file with the registry: (1) the number of those insurance policies; (2) the holder, beneficiary, and current status of those policies; and (3) the city of origin, domicile, or address for each policy holder. *See* Cal. Ins. Code § 13804(a). Further, with regard to each policy, the insurer must certify one of the following: (1) that the proceeds of the policies have been paid to the designated beneficiaries or their heirs where that person or persons, after diligent search, could be located and identified; (2) that the proceeds where the beneficiaries or heirs could not, after diligent search, be located or identified, have been distributed to Holocaust survivors or to qualified charitable nonprofit organizations for the purpose of assisting Holocaust survivors; (3) that a court of law has certified in a legal

proceeding resolving the rights of unpaid policyholders, their heirs, and beneficiaries, a plan for the distribution of the proceeds; or (4) that the proceeds have not been distributed and the amount of those proceeds. *See* Cal. Ins. Code § 13804(b).

Under the regulations, these reports were to be filed on or before April 7, 2000. *See* Cal. Code Regs. § 2278.4. Under the statute, if the reports were not filed by the 210th day after the HVIRA became effective (May 7, 2000), the Commissioner "shall suspend the certificate of authority to conduct insurance business in the state. . . ." Cal. Ins. Code § 13806.[3]

2. *California Civil Procedure Code § 354.5*

Under this statute, any Holocaust victim or heir or beneficiary who resides in the state may bring a legal action to recover on any claim arising out of an insurance policy or policies purchased or in effect in Europe before 1945 from an insurer (defined term), "notwithstanding any other provision of law." Cal. Civ. Proc. Code § 354.5(b). Further, it forbids dismissal of any claim whether brought by a resident or nonresident on statute of limitations grounds as long as the action is commenced on or before December 31, 2010. *See* Cal. Civ. Proc. Code § 354.5(c).

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3. Defendant has represented that he will not attempt to enforce the statute against plaintiffs until 20 days after the motions for preliminary injunction have been heard.

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3. *California Insurance Code § 790.15*

This statute modifies the Insurance Code to empower the Insurance Department of the State of California to suspend the license of an insurer admitted to do business in California if the Department concludes that an "affiliate" of the insurer has failed to pay any valid claim from Holocaust survivors.

B. *International Negotiations*

The federal government, along with foreign governments and insurance companies, is also grappling with the same goal of giving Holocaust victims some compensation for lost monies from insurance policies.

The United States and German governments have recently negotiated the formation of the Foundation for Remembrance, Responsibility, and the Future ("Foundation") funded by the German government and German corporations to resolve the claims of Holocaust victims. The Foundation is capitalized with approximately $5 billion dollars toward payments of victims of slave and forced labor, as well as payments on asserted claims related to insurance, banking, taking of property, and medical experiments. In a December 13, 1999 letter to Chancellor Schroeder, President Clinton stated that the executive agreement between the two countries shall state that the "Foundation should be regarded as the exclusive remedy for all claims against German companies arising out of the Nazi era." (American: Sullivan Decl.

Ex. 6, 12/13/99 Clinton letter to Schroeder).[4] Deputy Secretary of the Treasury Stuart Eizenstat is the principal representative of the United States on these issues.

A second organization, the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), chaired by former Secretary of State Lawrence Eagleburger, was established as a voluntary organization between European regulators, major European insurance companies, representatives of Jewish and Holocaust survivor organizations, Israel, and the National Association of Insurance Commissioners in the United States. Generali and the Winterthur plaintiffs are members.

The framework for the ICHEIC is set out in a Memorandum of Understanding ("MOU"). Among other things, the MOU provides that the ICHEIC shall conduct an investigatory process to determine the current status of insurance policies issued to Holocaust victims for which claims are filed with the ICHEIC and shall establish a claims process to settle and pay individual claims. (American: Sullivan Decl. Ex. 13, MOU). Eizenstat told the House Banking Committee that "[t]he U.S. Government has supported the International Commission on Holocaust Era Insurance Claims since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era." (Winterthur: Grimm Decl. Ex. I, Eizenstat 2/9/00 at House Banking Committee

4. Many of the exhibits appear in some or all of the various plaintiffs' papers. The court will only cite to one location of each exhibit.

hearing).[5] It is expected that the German Foundation will recognize the ICHEIC as the exclusive mechanism for resolving insurance claims. (Winterthur: Grimm Decl. Ex. I, Eizenstat 2/9/00 at House Banking Committee hearing).[6]

C. *The Parties*

Plaintiffs in all four cases are insurance companies licensed to do business in California. Each set of plaintiffs alleges that the statutes are unconstitutional. In all four cases,

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5. Defendant objects that Eizenstat's statement lacks foundation and is inadmissible hearsay. At the preliminary injunction stage, however, the court may consider hearsay. "The urgency of obtaining a preliminary injunction necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be competent to testify at trial. The trial court may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial." *Flynt Distrib. Co., Inc. v. Harvey,* 734 F.2d 1389, 1394 (9th Cir.1984). Consequently, the court does not discuss each of defendant's evidentiary objections.

6. The plaintiffs also discuss a 1995 agreement between the United States and Germany to "settle compensation claims by certain United States nationals who suffered loss of liberty or damage to body or health as a result of National Socialist measures of persecution directly against them." This agreement provided for two separate payments by Germany in settlement of the claims. In return for the payments by the German government, the United States "declare[d] all compensation claims against the Federal Republic of Germany by United States nationals for damage within the meaning of [the Agreement] to be finally settled." This Agreement, although related in topic, is not directly applicable because it deals with claims against Germany, not against insurance companies, and does not appear to involve insurance claims.

defendant is Chuck Quackenbush in his capacity as the Commissioner of Insurance of the State of California.

1. *Gerling Global Reinsurance Corporation of America ("Gerling")*

Plaintiffs are five insurance companies licensed to do business in California. They are "related to" or "affiliated" with two German companies (Gerling- Konzern Allgemenine Versicherungs-AG ("GKA") and Gerling-Konzern Lebensversicherungs-AG ("GKL") that issued policies in Europe during the proscribed time period. Hence, they have to file reports. Gerling alleges that the HVIRA is unconstitutional under: (1) the constitutional grant of authority to the federal government over foreign affairs; (2) the Commerce Clause; (3) the Due Process Clause; (4) Bill of Attainder; (5) the Fourth Amendment; and (6) the Contracts Clause.

2. *American Insurance Association and American Re-Insurance Co. (together, "American")*

Plaintiffs are American Insurance Association ("AIA") and American Reinsurance Company ("AmRe"). AIA principally represents American insurance companies that did not issue insurance policies in Europe during the relevant period and do not own or control any companies that did.[7] Five members of AIA are related to European companies that issued the applicable policies. AmRe is a large

7. Assicurazioni Generali, a European Company, is also represented by American Insurance, but files its own motion for preliminary injunction.

insurance company licensed to do business in California. AmRe claims that neither it, nor any subsidiary or affiliate over which it has control, issued insurance policies that were in effect in Europe during 1920-1945.

American claims that the statutes are unconstitutional for three reasons: (1) the HVIRA treads on the federal government's exclusive power to conduct foreign relations; (2) the HVIRA violates the Foreign Commerce Clause; and (3) the HVIRA violates the Due Process clause.

3. *Winterthur International American Insurance Co., et al. (together, "Winterthur")*

Plaintiffs are nine insurance companies licensed to do business in California. None of the companies ever issued insurance policies in Europe during the applicable time period, though each is "related" to such a company. Each plaintiff claims, however, that it is not in possession, custody, or control of any records pertaining to insurance companies sold by "related companies."

Winterthur argues that the HVIRA is unconstitutional because: (1) it is an unconstitutional invasion of the federal government's foreign affairs power; (2) it violates the Dormant Commerce Clause; (3) it violates the Due Process Clause; (4) it deprives plaintiffs of rights secured by the Equal Protection Clause; (5) it is an unconstitutional bill of attainder; and (6) implementation constitutes an unreasonable search and seizure.

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4. *Assicurazioni Generali, S.p.A ("Generali")*

Generali is an Italian insurance company that issued insurance policies in Europe during the applicable time period. Generali is represented by the AIA, but has filed separately because it claims that the Insurance Commissioner has singled it out for attack, even though it has been paying insurance claims from Holocaust victims for the last several years.

Generali claims the HVIRA unconstitutionally violates the Due Process and Commerce Clauses and invades the foreign affairs power of the federal government.

D. *Threatened Enforcement*

The Commissioner has actively threatened enforcement against all plaintiffs. He subpoenaed many insurance companies, including plaintiffs and those represented by plaintiffs, to appear at a hearing on December 1, 1999. At the hearing, Quackenbush informed the insurance companies, "[t]his issue will be resolved in California. I promised that for the last two years. And on April 6th, you're going to see just how serious California is if you have not complied with this law." (Generali: Tiberini Decl., Ex. 10, Transcript of 12/1/99 Investigatory Hearing, 14:16-20). He told Generali specifically, "I want you to take back to your officers in Italy and everywhere else, that you might want to consider seriously leaving the State, because it's obvious to me right now that you have no intention of complying with the law." (Generali: Tiberini Decl., Ex. 10, Transcript of 12/1/99 Investigatory Hearing, 49:12-16).

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At the end of questioning Generali, Quackenbush stated generally, "[i]t is your choice now whether you're going to work with this Department of Insurance to bring your company in full compliance, whether you're going to leave the state voluntarily, or whether I'm going to kick you out. That's your three choices." (Generali: Tiberini Decl., Ex. 10, Transcript of 12/1/99 Investigatory Hearing, 51:19-23).

II. *Standard*

"To obtain a preliminary injunction, a party must establish either: (1) probable success on the merits and irreparable injury, or (2) sufficiently serious questions going to the merits to make the case a fair ground for litigation with the balance of hardships tipping decidedly in the movant's favor." *See Baby Tam & Co. v. City of Las Vegas,* 154 F.3d 1097, 1100 (9th Cir. 1998). These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. *See id.* The movant has the burden of proving each element of either test. *See Prescott v. County of El Dorado,* 915 F. Supp. 1080, 1084 (E.D. Cal. 1996).

Under the doctrine of *Ex Parte Young,* 209 U.S. 123 (1908), it is appropriate for a party to move for a preliminary injunction in federal court against state officers "who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution. . . ." *Id.* at 156. A preliminary injunction is particularly appropriate when the moving party is faced with a "Hobson's choice" of continuing to violate the law, thus exposing itself to huge

liability, or to "violate the law once as a test case and suffer the injury of obeying the law during the pendency of the proceedings and any further review." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992).

III. *Probability of Success on the Merits*

Among them, the various plaintiffs make seven claims regarding the constitutionality of the statutes. They claim that the statutes violate: (1) the constitutional grant of authority to the federal government over foreign affairs (all parties); (2) Commerce Clause (all parties); (3) the Due Process Clause (all parties); (4) Bill of Attainder (Gerling and Winterthur); (5) the Fourth Amendment (Gerling and Winterthur); (6) the Contracts Clause (Gerling); and (7) Equal Protection (Winterthur). The court finds that plaintiffs have established a probability of success under the foreign affairs doctrine and the Commerce Clause. Accordingly, the court limits its analysis to these claims, and it is unnecessary to address the other claims.

A. *Foreign Affairs*

The framers of the Constitution made clear that the federal government was to have supreme power in the general field of foreign affairs. *See Hines v. Davidowitz*, 312 U.S. 52, 62 (1941). James Madison, in addressing the people of the State of New York, explained that the proposed Constitution contained a "class of powers, lodged in the general government, consist[ing] of those which regulate the intercourse with foreign nations. . . . This class of powers forms an obvious and essential branch of the federal

administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations." Madison, *The Federalist Papers,* No. 42. Alexander Hamilton wrote, regarding the power of the federal judiciary over laws which involve the peace of the confederacy: "the peace of the WHOLE ought not be left at the disposal of a PART. The Union will undoubtably be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever be accompanied with the faculty of preventing it." Hamilton, *The Federalist Papers,* No. 80.[8]

The Supreme Court has clarified the federal government's control over foreign affairs. "The Constitution entrusts [the nation's foreign affairs and international relations] solely to the Federal Government." *Zschernig v. Miller,* 389 U.S. 429, 436 (1968). "Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink,* 315 U.S. 203, 233 (1942). "Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines,* 312 U.S. at 63.

Zschernig is the most recent case addressing the issue of foreign affairs. This case involved an Oregon probate law that conditioned inheritance rights of a nonresident alien upon the alien's ability to demonstrate that his country of origin

8. *See also The Federalist Papers* Nos. 3, 4. Here, John Jay discusses the importance of the national government in relation to keeping the peace with foreign powers.

would grant reciprocal rights to a U.S. citizen and would not confiscate any of the inherited property. *See Zschernig*, 389 U.S. at 430-431. The Court held that the statute "affect[ed] international relations in a persistent and subtle way," *id.* at 440, had "great potential for disruption or embarrassment," *id.* at 435, and had "more than some incidental or indirect effect in foreign countries," *id.* at 434. Thus, the statute intruded into "matters which the Constitution entrusts solely to the Federal Government." *Id.* at 436.[9]

1. *The HVIRA's Goal is International in Nature*

The stated goal of the HVIRA is to exercise a power exclusively entrusted to the national government. The statute states that "[t]his chapter is necessary to . . . encourage the development of a resolution to these [insurance claim] issues through the international process or through direct action by the State of California, as necessary." Cal. Ins. Code § 13801(f). Encouraging resolution through an international process clearly implicates matters of foreign affairs, and, as such, is a function vested in the national government.

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9. The First Circuit applied and interpreted *Zschernig* in *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *cert. granted*, 120 S. Ct. 525 (1999). There, the First Circuit declared unconstitutional a Massachusetts law which restricted the ability of Massachusetts and its agencies to purchase goods or services from companies that do business with Burma. *See id.* The First Circuit held that the law had "more than an incidental or indirect effect in foreign countries," *Natsios*, 181 F.3d at 52 (quoting *Zschernig*, 389 U.S. at 434), and a "great potential for disruption or embarrassment" as evidenced by the protests of America's trading partners, *id.* at 54 (quoting *Zschernig*, 389 U.S. at 435).

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2. *Effects on International Relations and Potential for Disruption and Embarrassment*

Plaintiffs have demonstrated a probability that the HVIRA affects international relations. The United States federal government has been actively involved in compensating Holocaust victims since the end of World War II. In 1952, the United States was a party to a treaty among France, England, the United States, and Germany transferring to the Federal Republic of Germany the responsibility for implementing reparations. "The Federal Republic [of Germany] acknowledges the obligation to assure . . . adequate compensation to persons persecuted for their political convictions, race, faith or ideology, who thereby have suffered damage to life, limb, health, liberty, property, their possessions or economic prospects (excluding identifiable property subject to restitution)." (Gerling: Appendix of Authorities, Ex. A, Transition Agreement, Ch. 4 ¶ 1). Since that treaty, the United States has been actively involved in Holocaust victims compensation efforts. The HVIRA has a strong potential of interfering with these efforts.

First, the HVIRA has the real potential of frustrating the United States' efforts in negotiating the German Foundation. This Foundation, capitalized at close to $5 billion, will provide payments to victims of slave and forced labor as payments on asserted claims related to insurance, banking, taking of property, and medical experiments. On December 17, 1999, Secretary of the Treasury Stuart Eizenstat, the Special Representative of the Secretary of State and the President on Holocaust-Related Issues Senate Foreign

Relations Committee, stated that "[i]n the context of a comprehensive German Foundation, in all cases, consensual and non-consensual, brought against German companies for claims arising out of the Nazi-era, we are prepared to say that the German Foundation should be regarded as the exclusive remedy and that dismissal of such cases would be in our foreign policy interests." (American: Sullivan Decl. Ex. 11, 12/17/99 Press Release).[10] The German Foundation cannot be the exclusive remedy if California's HVIRA is also applicable.

Second, the HVIRA has a potentially negative effect on the ICHEIC, which is a voluntary organization of European regulators, major European insurance companies, representatives of Jewish and Holocaust survivor organizations, Israel, and the National Association of Insurance Commissioners in the United States insurance companies. The ICHEIC investigates Holocaust era insurance policies and helps settle claims. Eizenstat wrote Quackenbush in November 1999 that the HVIRA "has the unfortunate effect of damaging the one effective means now at hand to process quickly and completely unpaid insurance claims from the Holocaust period, the International Commission on Holocaust Era Insurance Claims. . . ." (American: Sullivan Decl. Ex. 24, 11/30/99 Eizenstat letter to Quackenbush). Further, Eizenstat informed Quackenbush, "you should know that actions by California, pursuant to this law, have already threatened to damage the cooperative spirit which the

10. Defendant argues that the German Foundation is not in place, and thus is not a federal policy. However, the very negotiation for a German Foundation dedicated toward compensation implicates foreign policy.

International Commission requires to resolve the important issue for Holocaust survivors." (American: Sullivan Decl. Ex. 24, 11/30/99 Eizenstat letter to Quackenbush). Eizenstat wrote Governor Davis on the same day, stating, "actions by California, pursuant to this law, have already potentially damaged and could derail both a settlement of forced and slave labor negotiations and the progress already achieved by the International Commission on Holocaust Era Insurance Claims. . . ." (American: Sullivan Decl. Ex. 23, 11/30/99 Eizenstat letter to Governor Davis).

Former Secretary of State Lawrence Eagleburger, the chair of the ICHEIC, testified that he believes that under the terms of the MOU under which the ICHEIC was organized, each insurance company that signed the MOU and is fully cooperating in the ICHEIC process "is entitled to receive, and should receive," an exemption from the enforcement of legislation such as the HVIRA. (Winterthur: Eagleburger Decl. ¶ 12). Section 10 of the MOU requires signatories to "work to achieve exemptions from related pending and future legislation . . . for those insurers that become signatories to this MOU and which fully cooperate with the processes and funding of the IC." (Winterthur: Eagleburger Decl. Ex. A.). ICHEIC members include plaintiffs Winterthur and Generali.

Third, the HVIRA potentially conflicts with the January 29, 2000 Joint Statement issued by the United States and Swiss governments at the inaugural meeting establishing the Swiss-US Joint Economic Commission ("Joint Statement"). Specifically, in the Action Plan attached to the Joint Statement, the United States government promised to "call on the U.S. State insurance Commissioners and State

legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers." (Winterthur: Thalmann Supp. Decl. Ex. A, Joint Statement Action Plan at 3).

Finally, the HVIRA potentially conflicts with the national goal of creating "enduring legal peace." Eizenstat referred to this goal in his November 30, 1999 letter to Governor Davis. With regard to the German Foundation, Eizenstat stated, "[c]learly, for this deal to work . . . German industry and German government need to be assured that they will get 'legal peace', not just from class-action lawsuits, but from the kind of legislation represented by the California Victim Insurance Relief Act." (American: Sullivan Decl. Ex. 23, 11/30/99 Eizenstat letter to Governor Davis). President Clinton and Secretary of State Madeline Albright each echoed this sentiment several weeks later as the negotiations for the German Foundation began to close. President Clinton, in a December 13, 1999 letter to Chancellor Schroeder, wrote that "the Foundation should be regarded as the exclusive remedy for all claims against German companies arising out of the Nazi era. [The executive agreement] will state further that both our countries desire all embracing and enduring legal peace to advance our foreign policy interests." (American: Sullivan Decl. Ex. 6, 12/13/99 Clinton letter to Schroeder). Albright, when addressing the Slave Labor Meeting in Berlin on December 17, 1999 stated in relation to the German Foundation that "[t]he United States is agreeing to assist in providing legal peace to German companies, both in our courts and from state and local action. To succeed in achieving legal peace, it is essential that the Foundation be comprehensive." (American: Sullivan Decl. Ex. 9, 12/17/99 Albright remarks).

By conflicting so directly with the national government's policies and promises, the HVIRA not only affects international relations, but also has "great potential for disruption or embarrassment." *See Zschernig,* 389 U.S. at 435. The HVIRA is inconsistent with Eizenstat's statements regarding the German Foundation as the exclusive remedy for claims from the Nazi era. It conflicts with the cooperative spirit of the ICHEIC, which the United States supports. The HVIRA makes the United States' promises in the U.S.-Swiss Joint Economic Statement appear to be unfulfilled. Finally, "legal peace" cannot be achieved if California and each of the other states are free to enact their own legislation forcing companies to report insurance policies or lose their license. *See* Cal. Code Ins. §§ 13800-13807.

Defendant argues that plaintiffs "have not demonstrated that the Holocaust Statutes have an actual direct impact on foreign relations. Indeed, plaintiffs cannot point to any federal policy enactments that the Holocaust Statutes must give way to." (Opp'n. at 84). Defendant then cites to the declarations of Robert Brown, the representative of the Minister of Israeli Society in the World Jewish Community, Linda Gerstel, a shareholder in a law firm representing Holocaust victims in class action insurance cases, and Leslie Tick, staff counsel to the Department of Insurance, and an attorney for defendant.[11] Brown states that he took part in the negotiations of the German Foundation settlement and claims that he does "not believe that the [HVIRA] interfered with the negotiations of the Germany Foundation settlement."

11. Plaintiffs object on numerous grounds to parts of all three declarations. Because the court does not rely on the declarations, the court does not address the objections.

(Opp'n.: Brown Decl. ¶ 6). Gerstel testified that she participated in the German Foundation negotiations and states that "[n]othing in the negotiations . . . was intended to effect or nullify the powers of the State Insurance Commissioners or any related regulatory scheme including, but not limited to, legislation enacted in California." (Opp'n.: Gerstel Decl. ¶ 7). Tick described the formation of the ICHEIC and its work. Defendant has not made clear which portion of her lengthy declaration and exhibit supports defendant's claim.

Defendant's argument is wholly unpersuasive. First of all, as discussed above, several policy makers in the Executive Branch have clearly stated the United States' position with regard to the compensation of Holocaust victims. The fact that several participants in the German Foundation negotiations stated that they do not think that negotiations were compromised by the California statutes is irrelevant. The German Foundation negotiations are simply an illustration of potential foreign affairs that could be affected by the HVIRA. In any case, even if the HVIRA did not actually affect the negotiations, it certainly has the potential to affect foreign affairs *and* it is embarrassing to the United States to have individual states enacting legislation inconsistent with Executive promises and negotiations. *See Zschernig,* 389 U.S. at 435. Thus, the HVIRA interferes with the national government's exclusive power over external affairs. *See Pink,* 315 U.S. at 233.

Second, there does not have to be a formally stated national policy in order for a state to impermissibly interfere with foreign affairs. Under *Zschernig,* a state statute that affected international relations in "a persistent and subtle

way" was held unconstitutional for impacting the federal government's foreign affairs powers. *Zschernig,* 389 U.S. at 440.

Finally, defendant's argument confuses the preemption doctrine with the foreign affairs power. A state cannot pass statutes that interfere with foreign affairs whether or not the national government has a stated policy. *See Pink,* 315 U.S. at 233 ("Power over external affairs is not shared by the States; it is vested in the national government exclusively.").

Defendant cites to *Clark v. Allen,* 331 U.S. 503 (1947), in support of his argument that plaintiffs must articulate a specific national policy violated by the HVIRA. *Clark,* however, does not stand for such a proposition. In *Clark,* the Supreme Court held that, generally, rights to succession are determined by local law. However, those rights may be affected by an overriding federal policy. *See id.* at 517. In *Clark,* the Court did not find an overriding federal policy, nor did the Court find that the statute had anything more than an "incidental and indirect effect in foreign countries." *See id.* Therefore, the statute did not impermissibly intrude on foreign affairs powers. *Clark* did not require that there be an overriding federal policy. The Supreme Court simply found that there was none.

Defendant further argues that the German Foundation and the ICHEIC are not as comprehensive as the HVIRA with regard to reporting. Defendant points out that the German Foundation does not have a reporting requirement and that the ICHEIC, as a voluntary organization, does not encompass all the insurance companies addressed by the

HVIRA. These assertions may be true. However, foreign affairs remains the province of the national government; the states do not have authority to fill in perceived gaps in international measures as they see fit. The United States must be able to speak with one voice on matters of international concern.

'3. *More than an Incidental Effect on Foreign Countries*

Defendant argues that the effect is on foreign companies, not foreign governments, and thus the HVIRA does not violate the foreign affairs policy. The language of *Zschernig* requires that the statute have "more than some incidental or indirect effect in foreign *countries,"* not foreign governments. *Zschernig,* 389 U.S. at 434. "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted by a government." *Zschernig* 389 U.S. at 441 (quoting *Hines* 312 U.S. at 64).

Plaintiffs have demonstrated a probability of success in showing that the HVIRA has more than some incidental effect in foreign countries. In addition to the interference with foreign commerce and the interference with foreign relations, the immediate effect of the statute is to require foreign companies to do an extensive search of warehouses and then compile a massive report, even if the company's only connection with California is through a subsidiary.

Plaintiffs have also raised a serious issue that the statutes are in conflict with some European Privacy laws.

For example, in its Amicus brief, the Federal Republic of Germany argues that the disclosure of information and documentation by German insurers to the California Insurance Department without the express authorization of policyholders or their beneficiaries could place the German insurers in violation of the Bundesdatenschutzgesetz (German Federal Data Protection Act, "BDSG"). Federal Republic of Germany Amicus Brief at 6). Violation of the BDSG "may result in criminal as well as civil penalties." (Federal Republic of Germany Amicus Brief at 6). Gerling submits the Declaration of Dr. Spiros Simitis, a professor at Yale Law School and a former Data Protection Commissioner of the German State of Hesse. After an extensive analysis of the BDSG, Simitis states that "under present conditions, [Gerling's] German affiliates are not allowed to transfer the data requested." (Gerling: Reif Decl. Ex. 10, Simitis Decl. ¶ 28).[12]

Defendant argues that in fact, the HVIRA and related statutes do not conflict with the BDSG. Defendant submits the declaration of Paul Schwartz, a professor at Brooklyn Law School. Schwartz states that he has been recognized as an expert on data protection law. He disagrees with Simitis' final conclusion and gives his own lengthy interpretation of the BDSG. (Opp'n.: Schwartz Decl. ¶ 6).[13]

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12. Simitis also notes that European Union has a Data Protection Directive which "explicitly affirms the individual's right to determine the use of her or his data." (Gerling Reif Decl. Ex. 10, Simitis Decl. ¶ 11).

13. Defendant also argues that the ICHEIC has already published the names of some German companies policyholders on

(Cont'd)

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There is an obvious dispute as to whether the HVIRA conflicts with the German BDSG and other European laws. The very fact that a state law requires a foreign company to do something that arguably violates the laws of the countries in which it is incorporated or does business shows that the law has an effect on international relations which is more than "incidental."

Plaintiffs have made a persuasive showing that the HVIRA interferes with foreign relations, has great potential for disruption or embarrassment, and has more than an incidental effect in foreign countries. Accordingly, plaintiffs have shown a probability of success on their claim that the HVIRA interferes with the federal government's control over foreign affairs.[14]

(Cont'd)
its website. Defendant argues that it "defies logic" that the ICHEIC would violate German laws. The question is not before the court as to whether the ICHEIC's actions violated German laws.

14. Defendant cites *Trojan Technologies v. Commonwealth of Pennsylvania*, 916 F.2d 903 (3rd Cir. 1990) in an attempt to distinguish *Zschernig*. In *Trojan*, the Third Circuit examined a Pennsylvania "buy American" statute. This statute required agencies of the Commonwealth when constructing public works to include a provision in all contracts that steel used in the projects must be produced in the United States. *See id.* at 904. The Third Circuit found this statute did not interfere with the federal government's exercise of the Foreign Affairs power because "[t]he Pennsylvania statute exhibits none of the dangers attendant on the statute reviewed in *Zschernig*." *Id.* at 913. The Third Circuit noted that the statute was evenhanded in its application, applying to steel from any foreign
(Cont'd)

Appendix D

B. *Commerce Clause*

The Commerce Clause reserves to Congress the right "to regulate commerce with foreign Nations, and among the several States. . . ." U.S. Const. art. 1, § 8, cl. 3. "[E]ven in the absence of specific action taken by the Federal Government," the Commerce Clause limits the powers of states to enact laws regulating interstate or foreign commerce. *Wardair Canada, Inc. v. Florida Dep't. of Revenue,* 477 U.S. 1, 7-8 (1986).

1. *McCarran-Ferguson Act*

State regulation and taxation of insurance is often excepted from Commerce Clause restrictions through the McCarran-Ferguson Act. This Act was passed in the wake of *United States v. South-Eastern Underwriters Association,* 322 U.S. 533 (1944), which held that insurance is "commerce" within the meaning of the Commerce Clause. *See Western and Southern Life v. State Board of Equalization of Cal.,* 451 U.S. 648, 653-654 (1981). Congress, believing "that the business of insurance is 'a local matter, to be subject to and regulated by the laws of the several States,' " enacted

(Cont'd)
source "without respect to whether the source country might be considered friend or foe." *Id.* Here, while the HVIRA is arguably evenhanded, it does exhibit other "dangers" not at issue in *Trojan,* and thus violates the Foreign Affairs power. Among other things, the HVIRA is inconsistent with several of the national government's statements, policies, and promises, and it potentially violates foreign laws. Thus, it affects foreign relations, is potentially disruptive and embarrassing, and has more than incidental effects in foreign countries.

the McCarran-Ferguson Act, which Congress intended to restore state taxing and regulatory powers over the insurance business to their pre *South-Eastern Underwriters* scope. *See id.* at 654 (quoting H.R.Rep. No. 143, 79th Cong., 1st Sess., 2). Specifically, the Act states, "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a).

Defendant thus argues that the HVIRA is exempted from Commerce Clause restrictions by the McCarran-Ferguson Act. The HVIRA, however, does not appear to fall within the scope of regulations intended to be exempted by the Act.

In *Federal Trade Commission v. Travelers Health Association,* 362 U.S. 293 (1960), the Supreme Court held that the Federal Trade Commission could issue a cease and desist order against certain insurance practices by a Nebraska insurance company. The company's activities, selling insurance through an interstate mail order insurance business, were extraterritorial, and thus were not regulated by state law within the meaning of the McCarran-Ferguson Act. *See id.* at 298. Thus, the insurance practices were not immune from federal control. The court stated that it is clear from the debate surrounding the implementation of the McCarran-Ferguson Act "that Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. There was no indication of any thought that a State could regulate activities carried on beyond its own borders." *Id.* at 300.

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The Ninth Circuit discussed the holding in *Travelers* in its opinion in *In re Insurance Antitrust Litigation v. Ace Check Cashing Inc.*, 938 F.2d 919 (1991), *aff'd in part, rev'd in part* by *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993). "[E]stablished law blocks regulation by one state of the United States of the insurance business outside the borders of that state." *Id.* at 928. "[A] state does not have power to regulate in any way contracts of insurance or reinsurance entered into outside its jurisdiction even though the risks covered were risks within the state." *Id.*

Here, the HVIRA attempts to regulate the decision making authority of European insurance companies to pay or not to pay claims on European policies. *See* Cal. Ins. Code. § 13801(f) ("This chapter is necessary to . . . encourage the development of a resolution to these [Holocaust era insurance claim] issues through the international process or through direct action by the State of California."). The HVIRA specifically asks for information about insurance policies sold "directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945." Cal. Ins. Code § 13804(a). Clearly the "State where occurred the activity sought to be regulated" was not California. *Travelers*, 362 U.S. at 300.

Further, in discussing the passage of the McCarran-Ferguson Act, the Supreme Court stated, "[o]ne of the major arguments advanced by proponents of leaving regulation to the States was that the States were in close proximity to the people affected by the insurance business and, therefore, were in a better position to regulate that business than the Federal Government." *Id.* at 302. Although some of the people

affected by the HVIRA may now be California residents, the HVIRA makes no distinction between reporting insurance policies related to California residents and insurance policies related to residents of any other state or foreign county. There is no legitimate reason why California should regulate the reporting of these policies.

Under *SEC v. National Secur. Inc.*, 393 U.S. 453, 460 (1969), licensing companies is considered the "business of insurance" within the meaning of the McCarran-Ferguson Act. However, the gist of the HVIRA is not about licensing insurance companies, but rather about forcing companies to report on insurance policies issued in Europe and using the threat of license suspension as an enforcement mechanism.

The McCarran-Ferguson Act does not insulate the HVIRA from analysis under the Commerce Clause.

2. *Violations of the Commerce Clause*

Plaintiffs have shown a probability that the HVIRA violates the Commerce Clause. Although there is only one Commerce Clause, "state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny" than are regulations on interstate commerce. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984). The section of the commerce clause dealing with foreign commerce is often referred to as "the Foreign Commerce Clause."

Appendix D

a. *One Voice*

The Foreign Commerce Clause is a subset of the broader foreign affairs powers discussed above. "Foreign commerce is pre-eminently a matter of national concern." *Japan Line, LTD. v. County of Los Angeles,* 441 U.S. 434, 448 (1979). "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Id.* "The Federal Government must speak with one voice when regulating commercial relations with foreign governments." *Id.*

The HVIRA potentially prevents the federal government from speaking with one voice in its expectations of foreign insurance companies. Under the HVIRA, foreign insurance companies must conduct an extensive and thorough search for records. *See* Cal. Ins. Code § § 13804(a) and 13804(b). Further, the companies must certify whether or not claims of Holocaust victims have been paid, and must certify whether or not they have searched for the victims. *See* Cal. Ins. Code § 13804(b). These demands emanate not from the national government, but from an individual state, and would be in conflict with the national government's promises to Germany that the German Foundation would be the exclusive relief for claims from Holocaust victims.[15]

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15. Defendant points out that commerce is controlled by Congress, not the Executive Branch. *See Barclays Bank v. Franchise Tax Bd.,* 512 U.S. 298, 329 (1994). However, Congress "may delegate very large grants of its power over foreign commerce to the President, who also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs." *Id.* (internal quotations omitted).

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3. *Commerce Outside State Borders*

The Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Ins.*, 491 U.S. 324 (1989). Defendant argues that the commerce does not take place wholly outside of California's borders. "The critical question is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* (citing *Brown Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

The practical effect of the HVIRA is that insurance companies that sold policies during the applicable time period must make an extensive search of their warehouses to come up with a list of individuals that might include Holocaust victims. It is common sense that most, if not all, of the companies that sold policies in Europe from 1920-1945 were European. They are being asked to gather voluminous European records of policies sold to Europeans and to report these records to California. The required records are not in any way tailored toward California citizens. The only connection to California is that the statute is enforced by taking away the company's or its affiliate's California license and the reporting is done to California. Clearly, California is meddling in foreign commerce entirely outside its borders.

Plaintiffs have shown a probability of success on the merits that the HVIRA violates the Commerce Clause.

Appendix D

C. *Other Constitutional Claims*

Because the court finds that plaintiffs have demonstrated a probability of success on the merits that the HVIRA is unconstitutional based on a violation of the federal foreign affairs power and a violation of the Commerce Clause, the court does not address the remaining constitutional issues.

IV. *Irreparable Injury*

It is the plaintiff's burden to demonstrate that the balance of irreparable harm favors the plaintiff. *See Carribean Marine Servs. Co. v. Baldridge,* 844 F.2d 668, 674 (9th Cir.1988). "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction . . . . a plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." Plaintiffs have met this burden.

The required reports under California Insurance Code section 13804 were due April 7, 2000. *See* Cal. Code Regs. § 2278. Under section 13806, if the parties did not file the reports by May 7, 2000, the Commissioner "shall suspend the certificate of authority to conduct insurance business in the state." Cal. Ins. Code § 13806.

Plaintiffs have demonstrated that suspension of their licenses to practice insurance in the state of California would cause them irreparable harm. Such suspension could undermine the goodwill of the company because the market may infer that the company is unstable. Further, a suspension would prevent plaintiffs from being able to renew contracts

for their existing policy holders causing further loss of goodwill. *See Rent-a-Center, Inc. v. Canyon Television and Appliance,* 944 F.2d 597, 603 (9th Cir. 1991) (affirming preliminary injunction and holding that damage to the goodwill of a business supports a finding of irreparable injury).

In addition, suspension is likely to cause reputational injury resulting in a loss of market share. *See United Services Automobile Ass'n v. Muir,* 792 F.2d 356, 362 (3rd Cir. 1986). Suspension might suggest marketplace fraudulent or illegal activity or financial instability. *See id.* Plaintiffs point out that suspending their licenses will imply publicly that the companies are implicated with the wrongdoings of the Holocaust, has acted illegally, or is not financially sound. Indeed, the Commissioner has already made such implications. For example, the California Department of Insurance has a website. One page is dedicated to Winterthur. Next to Winterthur is a picture of a concentration camp. The caption reads, "This company is an affiliate of one of what could be many companies that have outstanding, unpaid claims owed to Holocaust survivors, their heirs and beneficiaries, for life and property loss resulting from the atrocities committed during the Holocaust. It is time for justice." (Winterthur: Smith Decl. Ex 1; *http://www.insurance.ca.gov/docs/FS-Holocaust.htm.* Suspending Winterthur's license would further implicate the company, causing irreparable harm. *See Ross-Simons, Inc. v. Baccarat, Inc.,* 102 F.3d 12, 20 (1st Cir. 1996) ("By its very nature injury to goodwill and reputation is not easily measured or fully compensable in damages. Accordingly, this kind of harm is often held to be irreparable.").

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The public interest is also an important factor to be considered in a suit for injunctive relief affecting the public interest. *See Miller v. California Pac. Med. Ctr.*, 991 F.2d 536, 540 (9th Cir. 1993). If plaintiffs' licenses are suspended, the companies would not be able to write any new business in California. Although they would be obligated to service claims on existing policies until those policies expired by their natural terms, the companies would not be able to modify or renew the existing policies. For example, if a policyholder wanted to increase her policy limits, she would not be able to do so.

In many cases, the existing policy will expire within the year. At the end of the year, policyholders will be scrambling to find new insurers. This task could become more difficult due to the decreased number of insurance companies in the state as a result of the suspension provisions of the HVIRA.

Finally, license suspension would undoubtably affect the insurance companies' employees. Companies that could no longer write policies in California would likely have to lay off or fire their employees engaged in underwriting and sales. Plaintiffs have demonstrated that irreparable harm will likely occur if the HVIRA is enforced.

V. *Conclusion*

None of the plaintiffs deny that the Holocaust was a terrible atrocity. And none of the plaintiffs deny that the victims and their heirs and beneficiaries should be compensated to the extent possible. However, even though the end goal of such compensation is laudable, this goal may

not be achieved through unconstitutional means. Plaintiffs have shown a probability of success on the merits of their claim and have shown that irreparable harm will occur if the court does not enjoin enforcement of the HVIRA.

IT IS THEREFORE ORDERED that plaintiffs motions for preliminary injunction be, and the same hereby are, GRANTED.

Pending final judgment in these actions, defendant is enjoined from enforcing the provisions of the Holocaust Victim Insurance Relief Act and the accompanying regulations. Cal. Ins. Code §§ 13800-13807 and Cal. Code Regs. §§ 2278-2278.5.

s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

APPENDIX E — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Appendix E

Cal. Ins. Code § **13800** (2001)

§ **13800**. Short title

This chapter shall be known and may be cited as the Holocaust Victim Insurance Relief Act of 1999.

Appendix E

Cal. Ins. Code § **13801** (2001)

§ **13801**. Findings

The Legislature finds and declares the following:

(a) During World War II, untold millions of lives and property were destroyed.

(b) In addition to the many atrocities that befell the victims of the Nazi regime, insurance claims that rightfully should have been paid out to the victims and their families, in many cases, were not.

(c) In many instances, insurance company records are the only proof of insurance policies held. In some cases, recollection of those policies' very existence may have perished along with the Holocaust victims.

(d) At least 5,600 documented Holocaust survivors are living in California today. Many of these survivors and their descendents have been fighting for over 50 years to persuade insurance companies to settle unpaid or wrongfully paid claims. Survivors are asking that insurance companies come forth with any information they possess that could show proof of insurance policies held by Holocaust victims and survivors, in order to ensure that closure on this issue is swiftly brought to pass.

(e) Insurance companies doing business in the State of California have a responsibility to ensure that any involvement they or their related companies may have had with insurance policies of Holocaust victims are disclosed to the state and to ensure the rapid resolution of these questions, eliminating the further victimization of these policyholders and their families.

(f) The international Jewish community is in active negotiations with responsible insurance companies through the International Commission on Holocaust Era Insurance Claims to resolve all outstanding insurance claims issues. This chapter is necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California, as necessary.

Appendix E

Cal. Ins. Code § **13802** (2001)

§ **13802**. Definitions

For purposes of this chapter, the following definitions shall apply:

(a) "Holocaust victim" means any person who was persecuted during the period of 1929 to 1945, inclusive, by Nazi Germany, its allies, or sympathizers.

(b) "Related company" means any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer.

(c) "Proceeds" means the face value or other payout value of insurance policies and annuities plus reasonable interest to date of payment without diminution for wartime or immediate postwar currency devaluation.

Appendix E

Cal. Ins. Code § **13803** (2001)

§ **13803**. Central registry

The commissioner shall establish and maintain within the department a central registry containing records and information relating to insurance policies, as described in Section **13804**, of Holocaust victims, living and deceased. The registry shall be known as the Holocaust Era Insurance Registry. The Attorney General, in coordination with the department, shall establish appropriate mechanisms to ensure public access to the registry.

Appendix E

Cal. Ins. Code § **13804** (2001)

§ **13804**. Required filings by insurers

(a) Any insurer currently doing business in the state that sold life, property, liability, health, annuities, dowry, educational, or casualty insurance policies, directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945, whether the sale occurred before or after the insurer and the related company became related, shall, within 180 days following enactment of this act, file or cause to be filed the following information with the commissioner to be entered into the registry:

(1) The number of those insurance policies.

(2) The holder, beneficiary, and current status of those policies.

(3) The city of origin, domicile, or address for each policyholder listed in the policies.

(b) In addition, each insurer subject to subdivision (a) shall certify to any of the following:

(1) That the proceeds of the policies described in subdivision (a) have been

paid to the designated beneficiaries or their heirs where that person or persons, after diligent search, could be located and identified.

(2) That the proceeds of the policies where the beneficiaries or heirs could not, after diligent search, be located or identified, have been distributed to Holocaust survivors or to qualified charitable nonprofit organizations for the purpose of assisting Holocaust survivors.

(3) That a court of law has certified in a legal proceeding resolving the rights of unpaid policyholders, their heirs, and beneficiaries, a plan for the distribution of the proceeds.

(4) That the proceeds have not been distributed and the amount of those proceeds.

An insurer who certifies as true any material matter pursuant to this subdivision, which the insurer knows to be false, is guilty of a misdemeanor.

(c) An insurer currently doing business in the state that did not sell any insurance policies in Europe prior to 1945, shall not be subject to this section if a related company, whether or not authorized and currently doing business in the state, has made a filing under this section.

Appendix E

Cal. Ins. Code § **13805** (2001)

§ **13805**. Filing false information

Any insurer that knowingly files information about a policy required by this chapter that is false shall, with respect to that policy, be liable for a civil penalty not to exceed five thousand dollars ($5,000), which penalty is hereby appropriated to the department to be used by it to aid in the resolution of Holocaust insurance claims.

Appendix E

Cal. Ins. Code § **13806** (2001)

§ **13806**. Suspensions for failure to comply

The commissioner shall suspend the certificate of authority to conduct insurance business in the state of any insurer that fails to comply with the requirements of this chapter by the 210th day after this section becomes effective, until the time that the insurer complies with this chapter.

Appendix E

Cal. Ins. Code § **13807** (2001)

§ **13807**. Adoption of rules and regulations

The commissioner shall adopt rules to implement this chapter within 90 days of its effective date. The rules shall be adopted as emergency regulations in accordance with Chapter 3.5 (commencing with Section 11340) of the Government Code, and for the purposes of that chapter, including *Section 11349.6 of the Government Code*, the adoption of the rules shall be considered by the Office of Administrative Law to be necessary for the immediate preservation of the public peace, health and safety, and general welfare.

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No. 02-722, 02-733

IN THE

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION *et al.*,
Petitioners,

v.

HARRY LOW, COMMISSIONER OF INSURANCE
FOR THE STATE OF CALIFORNIA,
Respondent.

GERLING GLOBAL REINSURANCE CORP. *et al.*,
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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE ORGANIZATION FOR INTERNATIONAL INVESTMENT FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.2(b) of the Rules of this Court, the Chamber of Commerce of the United States (the "Chamber") and the Organization for International Investment ("OFII") move for leave to file the accompanying brief as *amici curiae* in support of the petitions for writs of certiorari. Counsel for

the petitioners have consented to the filing of this brief, but counsel for the respondent has withheld consent.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than three million U.S. businesses and organizations of every size, in every business sector, and from every region of the country. Chamber members transact business in all or nearly all of the United States, as well as in a large number of countries around the world. An important function of the Chamber is to advocate its members' interests in matters of national concern before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

The Organization for International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies before all branches and at all levels of government. OFII's member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world.

Both organizations regularly file briefs as *amici curiae* in cases such as this one that raise issues of vital concern to the business community. Together they filed a brief as *amici curiae* in this Court in *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000), an important precursor to the present litigation. In this case, they again seek to assist the Court in exploring the Constitution's limits on the role of the states in the conduct of foreign affairs and foreign commerce.

The Chamber and OFII believe that this petition raises two related issues that are critical to the definition of a state's role in foreign policy and foreign commerce. First, this case provides the Court with an opportunity to resolve important

questions about the federal government's exclusive authority over foreign relations—questions left open in *Crosby*. Where the nation's foreign policy is clearly established at the federal level and its implementation by the federal government is ongoing, states may not insert themselves as protagonists on the international stage. *Crosby* unequivocally confirmed this principle in a case where U.S. foreign policy was embodied in an act of Congress, *id.* at 373-74. But *Crosby* did not directly address its applicability in the more common case where foreign policy is set and pursued through diplomatic initiatives undertaken by the Executive.

Second, this case provides the Court with an opportunity to resolve a conflict among the courts of appeal as to whether due process constraints on a state's legislative power prevent it from overreaching in international affairs. As noted, a state's power to act in foreign affairs is limited where such action conflicts with federal powers. But this limitation—on its own—does not fully define the boundaries of state action on the international stage. Under the Constitution, notions of due process also limit the extent to which a state may regulate parties and subject matters that lie beyond its borders. But the courts of appeal are split on the standard that governs these limits on state legislative power.

Chamber and OFII members depend on a stable and predictable framework of international laws and agreements, made possible by United States diplomatic efforts, that allow them to conduct business around the globe. In their view, the decisions below put that framework at risk, by permitting states to legislate beyond their boundaries in a deliberate effort to influence delicate international relations.

The accompanying Chamber and OFII brief offers a broader perspective on the importance of Supreme Court review in this case than that of the petitioners. In their brief, *amici* focus on the consequences of the Ninth Circuit's decisions for U.S. foreign policy-making writ large, as well as for global commerce, whose flows of goods and services

depend on networks of corporate relationships that the decision below puts in jeopardy. The Chamber and OFII believe that this perspective is not only relevant but indeed critical to a full appreciation of the need for review by this Court.

For the foregoing reasons, the motion of the Chamber and OFII for leave to file the accompanying brief as *amici curiae* should be granted.

Respectfully submitted,

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Under cover of the accompanying motion pursuant to Rule 37.2(b) of the Rules of this Court, the Chamber of Commerce of the United States and the Organization for International Investment respectfully submit this brief *amici curiae* in

support of Petitioners seeking writs of certiorari to the U.S. Court of Appeals for the Ninth Circuit.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici curiae are business associations that have a substantial interest in ensuring stable and predictable legal regimes affecting international trade and investment.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than three million U.S. businesses and organizations of every size, in every business sector, and from every region of the country. While most of the country's largest companies are Chamber members, 96% of its members are small businesses with fewer than 100 employees. Chamber members transact business in all or nearly all of the United States, as well as in a large number of countries around the world. An important function of the Chamber is to advocate its members' interests in matters of national concern before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

The Organization for International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies. OFII's member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Further, no counsel for any Petitioner or Respondent authored this brief in whole or in part.

Amici view the state legislation at issue in this case as a threat to their members' interests in a stable legal environment for business and investment, and as a significant hindrance to the foreign commerce on which their members, and the U.S. economy, depend.

SUMMARY OF THE ARGUMENT

The American Insurance Association *et al.* and Gerling Global Reinsurance Corp. *et al.* have petitioned for writs of certiorari to the U.S. Court of Appeals for the Ninth Circuit on the grounds that that court's decisions in *Gerling Global Reinsurance Corp. of America* v. *Low*, 296 F.3d 832 (9th Cir. 2002) and 240 F.3d 739 (9th Cir. 2001), *cert. withdrawn*, 534 U.S. 1120 (2002), clearly conflict with precedents of this Court and other courts of appeal regarding the exclusive foreign affairs powers of the federal government and the limits on a state's power to regulate beyond its borders. *Amici* agree and urge the Court to grant the petitions.

Amici are gravely concerned that California has enacted legislation that implements its own foreign policy agenda, with serious consequences for foreign commerce and for the nation's foreign policy. Specifically, California has enacted an insurance regulation that has impaired U.S. foreign policy negotiations and that continues to threaten a delicate international settlement. Officials of the U.S. government have confirmed repeatedly that the Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807 ("HVIRA")—which requires foreign insurance companies to provide information about foreign insurance policies issued abroad half a century ago, on pain of their California affiliates' exclusion from business in that state—has directly interfered with federal foreign policy promoting a global settlement of Holocaust-era claims. See Petition for a Writ of Certiorari at 8-12, *American Ins. Ass'n* v. *Low*, No. 02-722 (U.S. filed Nov. 7, 2002) ("Pet. 02-722").

This case requires the Court's intervention on two important federal questions. First, this case squarely presents a substantial and important question left unresolved in the Court's recent decision in *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000). There can be no doubt that a federal statute or treaty preempts a state statute on the same subject. See *id.* at 373-74. Yet, in the field of foreign affairs, where Congress rarely speaks directly and the President often acts through international negotiations and executive agreements, a question remains: is national foreign policy the exclusive province of the federal government even in those instances where that foreign policy is not embodied in a statute or treaty?

Second, this case presents an important question concerning the scope of a state's legislative power: to what extent may a state legislature seek to regulate parties or subject matters that lie beyond that state's territory or, as here, lie outside the United States? Statutes like HVIRA threaten cross-border corporate relationships by using U.S. corporate affiliations as a pressure point to extend a state's regulatory reach far beyond its borders, offering foreign and out-of-state businesses a lose-lose choice between, on the one hand, isolation and loss of competitiveness, and, on the other, affiliations that potentially subject them to the regulatory power of every one of our fifty state legislatures. Two courts of appeal have reached opposite answers to this question.

ARGUMENT

HVIRA INTERFERES WITH FOREIGN POLICY AND DISRUPTS FOREIGN COMMERCE.

Resolution of this case will answer two important federal questions: First, in those instances where national foreign policy is not embodied in a statute or treaty, is a state statute that interferes with that foreign policy prohibited, just as

surely as if Congress had acted? Second, to what extent may a state seek to regulate parties or subject matters that lie beyond its borders or, as here, lie beyond the borders of the United States?

In this case, the federal government has acted not through statute or treaty, but through the negotiation and formation by executive agreement of two international organizations to resolve Holocaust-era insurance claims: the Remembrance, Responsibility, and the Future Foundation ("Foundation") and the International Commission on Holocaust Era Insurance Claims ("ICHEIC"). The United States also negotiated the Swiss-U.S. Joint Agreement with an "Action Plan" for future settlement. These federal foreign policy initiatives—and the United States' relations with Germany and Switzerland—are threatened by California's interference. Likewise, California's actions pose serious and immediate risks to U.S. and foreign companies and to foreign commerce itself.

In this brief, *amici* wish to focus particular attention on the diplomatic, business, and economic implications of allowing HVIRA to stand.

A. Impact On The Conduct Of Foreign Affairs

Statutes like HVIRA have a corrosive effect on the conduct of foreign relations. United States diplomats and foreign policymakers will find that their ability to calibrate the mix of carrots and sticks at the international bargaining table has been abrogated by state action. National concerns will remain unresolved and the effects of such state actions will be felt far beyond the state's borders.

California deliberately chose to insert itself into delicate, U.S.-led international negotiations. The statute has the stated aim of "encourag[ing] the development of a resolution to these issues through the international process *or through direct action by the State of California, as necessary*." Cal. Ins. Code § 13801(f) (emphasis added). The very purpose of the statute is to make California's considerable weight felt

directly in the international negotiating arena, and in the implementation process that has since followed. Foreign governments and businesses would disregard California at their peril; its economy produces enough goods and services to be ranked among the top ten economies of the world.

California has ignored HVIRA's debilitating effects on the United States' international initiatives. As early as November 1999, then-Deputy Treasury Secretary Stuart Eizenstat wrote directly to California Governor Gray Davis and then-Insurance Commissioner Quackenbush stating that "actions by California, pursuant to this law, have already potentially damaged and could de[r]ail both a settlement of forced and slave labor negotiations and the progress already achieved by the International Commission on Holocaust Era Insurance Claims."[2] The United States has maintained the position ever since, in public statements and in this litigation, that HVIRA is hindering the nation's foreign policy interests.

By ignoring these pleas and imposing HVIRA's extensive regulatory burdens, California weakened U.S. diplomatic leverage in securing the international agreements settling the insurance claims. In reaching the international settlements, the U.S. emphasized its commitment to help obtain "legal peace" for foreign companies, stating that "it is in the enduring and high interest of the United States to support efforts to achieve dismissal of all National Socialist and World War II era cases against German companies."[3] When the United States and Germany signed the Foundation Agreement in July 2000, some insurance and other companies

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[2] Letter from Eizenstat, Deputy Treasury Secretary, to Davis, Governor (Nov. 30, 1999), *reproduced at* Pet. 02-722 app. 124a.

[3] Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, Annex B (Elements of U.S. Government Statement of Interest), 39 I.L.M. 1298, 1303-04.

funding the Foundation initially were hesitant to fulfill their large monetary obligations in light of the threats to legal peace from laws such as HVIRA and the suits that they spawn.[4] Those threats undermine the very goal of the executive agreements—the settlement of long overdue claims in a single, orderly international process.

HVIRA weakens national foreign policy, compromises the government's ability to conduct international negotiations, and makes it virtually impossible for the United States to fulfill its promises once international agreements are completed. By shouting down the federal government's single voice within the international community, HVIRA has caused more than just difficuity and embarrassment for the U.S. government abroad. HVIRA has threatened a global settlement that would benefit thousands of victims outside of California, for whom the global settlement is likely to be the only remedy.

This Court recently confirmed that federal legislation on foreign affairs preempts state legislation in the same area. *Crosby*, 530 U.S. at 373-74. But state interference with foreign affairs is not immunized simply because a federal foreign policy has not been formally codified by Congress.

The Constitution entrusts the nation's diplomatic and foreign economic relations exclusively to Congress and the President because, as national foreign policymakers, they are in a unique position to take into account all of the measures needed to advance the nation's interests as a whole. The absence of a federal statute or treaty does not imply the absence of a federal foreign policy, or the myriad calculations that go into formulating the nation's foreign policy. Rather, international agreements and negotiations are evidence that national foreign policymakers are carefully balancing the nation's competing interests, as surely as if a federal statute

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[4] *See, e.g.*, Henry Weinstein, *Holocaust Survivors Settlement Hits Snag*, L.A. Times, Mar. 10, 2001, at A15.

were enacted or a treaty signed. State statutes that interfere with national foreign policy upset this balance, potentially frustrating diplomatic efforts to settle the issue at hand.

Moreover, this Court has been clear that foreign policy is by no means the exclusive province of the legislature: "'the President ... possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs.'" *Barclays Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298, 329 (1994). As this Court noted in *Zschernig* v. *Miller*, 389 U.S. 429 (1968), "even in absence of a treaty, a State's policy may disturb foreign relations." *Id.* at 441. Under international law, an executive agreement invokes the international responsibility of the United States to the same degree as a treaty. Internationally binding executive agreements like those concluded by the United States with Germany and Switzerland deserve and require the same shield from state-level intrusions that treaties and statutes enjoy.

Zschernig remains the law of the land, and neatly articulates the need for plenary federal authority over foreign affairs. The Ninth Circuit's denigration of the *Zschernig* decision because of its age does nothing to undermine that holding's binding force.[5] And though this Court's decision in *Crosby* did not directly reach the federal foreign affairs or foreign commerce powers, it neither criticized nor called into question the First Circuit's holding on either ground in *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38 (1st

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[5] Courts routinely apply *Zschernig* to determine whether a state law impermissibly intrudes on the federal government's foreign affairs power. *See Miami Light Project* v. *Miami-Dade County*, 97 F. Supp. 2d 1174, 1178-79 (S.D. Fla. 2000) (invoking *Zschernig*, and finding Miami-Dade Resolution unconstitutional on preemption grounds). *Cf. North Am. Salt Co.* v. *Ohio Dep't of Transp.*, 701 N.E.2d 454, 462 (Ohio Ct. App. 1997) (applying *Zschernig* analysis); *Mukaddam* v. *Permanent Mission of Saudi Arabia to the United Nations*, 111 F. Supp. 2d 457, 472-73 (S.D.N.Y. 2000) (same).

Cir. 1999).[6] These decisions emphasize the well-founded concern that individual state actions will disrupt federal foreign policy.

This concern is not new—it extends back to the founding of this nation. Alexander Hamilton, in warning of the dangers of individual state foreign policies, identified the same dynamic: "[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members."[7] This is just the type of case that spurred Hamilton's concern. Today's rapid pace of globalization only makes those concerns more pressing. As the First Circuit noted, "in an increasingly interdependent and multilateral world, [the] affirmation of the foreign affairs power of the national government may be all the more significant." *Natsios*, 181 F.3d at 58 n.14.

Where, as here, state action conflicts with the express policy of the federal government, as evidenced by formal international negotiations and even signed executive agreements, that state law must be struck down just as if it were in conflict with a federal statute. Any other result would expose the foreign relations of this nation to the prospect of repeated and destructive intrusions by state initiatives unless Congress has acted—a construction for which there is no justification in the area of foreign affairs. The Court should

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[6] The Ninth Circuit's decision conflicts with the First Circuit's holdings in *Natsios*. Although this Court affirmed the First Circuit's decision on preemption grounds alone, it did not disturb the First Circuit's holding that the Massachusetts procurement law unconstitutionally interfered with the federal government's foreign affairs and foreign commerce powers. Within the First Circuit, then, a state law interfering with foreign policy and regulating commerce in foreign countries violates the federal government's exclusive power over foreign affairs; in the Ninth Circuit, apparently, it does not.

[7] *The Federalist No. 80*, at 535-36 (A. Hamilton) (J. Cooke ed. 1961) (emphasis in original).

hear this case in order to clarify this point, which it left unarticulated in *Crosby*.

The Court should also hear this case in order to resolve a conflict between courts of appeal with regard to states' power to interfere in foreign affairs through the regulation of foreign parties and foreign transactions. The Constitution's framework ensures federal control over the conduct of foreign affairs not only through its exclusive grant of foreign policy-making authority to the federal government, but also through the independent limitations that it sets on state regulatory power. The Due Process Clause requires that the extent of a state's regulatory authority must coincide with—and must not exceed—the extent of that state's legitimate interests. A state does not have the power to regulate a foreign (or domestic) subject if that subject does not have at least "minimum contacts" with the state.[8] Such baseline limitations on a state's legislative power help to prevent state interference in foreign affairs and foreign commerce.

In an international business environment characterized by complex business affiliations that often cross state and

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[8] The Eleventh and the Fourth Circuits recently confirmed that the extent of a state's legislative jurisdiction is determined largely by a "minimum contacts" analysis that is similar to the analysis in personal jurisdiction and choice-of-law questions. *See Gerling Global Reins. Corp. of Am.* v. *Gallagher*, 267 F.3d 1228, 1235 (11th Cir. 2001) ("To determine legislative jurisdiction ... we look to choice-of-law and personal jurisdiction analyses.... Applying these standards to the question before us now, we ask whether sufficient contacts exist between the Plaintiffs and the County ... such that it would not be fundamentally unfair to subject the Plaintiffs to the County's registration requirements."). *See also American Charities for Reasonable Fundraising Regulation, Inc.* v. *Pinellas County*, 221 F.3d 1211, 1216 (11th Cir. 2000); *Adventure Communications, Inc.* v. *Kentucky Registry of Election Fin.*, 191 F.3d 429, 435-37 (4th Cir. 1999). The Ninth Circuit's decision below diverged from the "minimum contacts" approach taken by the Eleventh and the Fourth Circuits, both in its articulation of the relevant legal standard and in its application of this standard to the facts.

national boundaries, it becomes especially important to respect those limitations. To permit state regulatory power to extend across vast networks of foreign companies in foreign countries—merely because a single network affiliate does business in California—ultimately threatens federal control over foreign affairs and foreign commerce. Yet the Ninth Circuit decision endorses exactly this result. On the other hand, the Eleventh Circuit, considering a Florida statute nearly identical to HVIRA last year, rejected that result on the grounds that it would amount to the exercise of legislative power by a U.S. state over "insurance transactions involving Plaintiffs' German affiliates that took place years ago in Germany, among German residents, under German law, relating to persons, property, and events in Germany." *Gerling Global Reins. Corp. of Am.* v. *Gallagher*, 267 F.3d 1228, 1238 (11th Cir. 2001). This Court's review is needed to reconcile this conflict between the Ninth and Eleventh Circuits, and to define the limits of state legislative authority.

B. Impact On Companies And Foreign Commerce

HVIRA's impact is not limited to the foreign policy arena. At a very practical level, California has jeopardized U.S. and foreign companies, as well as the interstate and foreign commerce in which they engage.

HVIRA requires insurance companies operating in the state to file detailed reports regarding policies sold to persons in Europe between 1920 and 1945. Cal. Ins. Code § 13804(a). The Act's reporting requirement extends to companies that never issued policies in Europe during this period, but are only "related" to those that actually issued policies. The statutory definition of a "related company" is stunningly broad, encompassing "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer" that is part of the same corporate structure. *Id.* § 13802(b). The reporting requirements thus apply to insurance companies operating in California whether or not they exercise any control over their foreign partners.

If HVIRA is upheld, those companies unable to comply with HVIRA's stringent requirements face suspension of their licenses to do business in California. This severe sanction means immediate loss of revenue, as well as injury to a company's reputation, resulting in loss of market share. It also threatens considerable disruption to California policy-holders, who may suddenly find themselves without valid insurance coverage.

The Ninth Circuit suggests that, if an insurance company is unable either to obtain the required documents from its foreign partners or to send its own employees overseas to inspect these documents, it still can avoid sanctions if it chooses to "disaffiliate and thus shed any reporting requirement," *Low*, 296 F.3d at 840. But today disaffiliation is not a viable option. Companies depend on complex, far-flung networks of corporate partners to remain competitive in the global marketplace. An insurance company that disaffiliates from its European partners likely faces the same consequences as a company that loses its license in California—loss of revenue, damage to its reputation, and a decrease in market share. An insurance company should not be forced to choose between losing its license in California and losing its affiliates in Europe.

HVIRA creates equally serious difficulties for foreign insurers. California's act requires foreign insurance companies to compile the same massive reports even if the company's only connection to California is through an affiliate or subsidiary. Put another way, it requires action by foreign insurance companies, over whom California has no jurisdiction, in connection with business transacted outside California as many as 80 years ago with persons having no nexus to California, on pain of regulatory harm to "related" California insurers. These foreign insurance companies never "purposefully availed" themselves of the California legal system and certainly could not have foreseen that their past activities in Europe might subject them to the authority of the

California legislature.[9] In addition, HVIRA ignores privacy laws that bind these foreign insurers in their own countries. It thereby forces these foreign companies to choose between violating their own domestic privacy laws or sacrificing an affiliate's business in California. To subject these foreign companies to California's legislative authority—solely due to an "abstract, indirect, and unaimed level of involvement" in the state, *American Charities for Reasonable Fundraising Regulation, Inc.* v. *Pinellas County*, 221 F.3d 1211, 1217 (11th Cir. 2000)—is fundamentally unfair and conflicts with the jurisprudence in other courts of appeal.

Enforcement of HVIRA would disrupt not only the affairs of individual companies, but also foreign commerce generally in several ways. Most directly, its enforcement would impose serious economic consequences on the insurance industry, the effects of which would be felt well beyond California's borders. More broadly, it threatens to destabilize the international business partnerships that have become a key mechanism for modern foreign commerce. HVIRA uses U.S. affiliates of foreign companies as a pressure point for regulating conduct far beyond its borders or its jurisdictional authority. That approach is impermissible under both the Commerce Clause and the Due Process Clause of the Constitution, and it is particularly troublesome in a globalizing economy.

The widespread suspension of certificates that HVIRA promises would generate uncertainty and confusion among policyholders, many of whom would be left scrambling for new coverage. The consequences of suspending the certificates would not be limited to California. The disruption of insurance coverage in the state would radiate outward, as

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[9] *See, e.g.*, *American Charities*, 221 F.3d at 1216 ("the regulated party must have performed some act by which it purposefully avails itself of the privilege of conducting activities within the [relevant jurisdiction]") (internal quotation marks omitted).

businesses and individuals in other states and countries react. Insurance companies suffering losses in one state might be forced to increase premiums elsewhere, affecting not only insured individuals but insured companies as well. A California import-export company insured by an affected insurance company, for example, might be forced to restrict its operations, affecting suppliers and customers in other states and countries. Furthermore, due to the accelerating pace of mergers and consolidations in the financial services industry, the disruption will extend even farther than it would have a few years ago.

These consequences are exacerbated by the proliferation of similar statutes. If HVIRA's extraterritorial reach is not reined in, it is likely that other states will continue to follow suit—potentially multiplying HVIRA's impact on foreign commerce tens of times over.[10] And if the HVIRA model stands, states may choose to adapt it to any number of other politically popular issues that tempt them to engage in regulation beyond their borders.

Even more disturbing than the immediate economic consequences of overreaching statutes like HVIRA is their effect on multinational corporate affiliations, an indispensable mechanism in foreign commerce. By seeking to regulate matters outside the state, HVIRA injects uncertainty into existing relationships between foreign and U.S. companies. State laws that try to control commerce overseas through regulation of local affiliates jeopardize the ability of U.S. companies to form critical international alliances, since potential foreign partners will legitimately fear being subjected to heavy reporting requirements and regulatory

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[10] Other states have already passed statutes that mirror HVIRA. Md. Code Ann., Ins. §§ 28-101 to 28-110; Minn. Stat. § 60A.053; N.Y. Ins. Law §§ 2701-2711; Tex. Ins. Code Ann. § 21.74; Wash. Rev. Code § 48.104.010. As noted, Florida's near-identical statute, Fla. Stat. ch. 626.9543, was struck down in *Gallagher*, 267 F.3d at 1240.

scrutiny by U.S. states in which they do no business. For foreign companies, laws like HVIRA present the very real possibility that their U.S. affiliates will become unwilling conduits for intrusive state regulations. Foreign companies considering joint ventures with or acquisitions of U.S. companies may reconsider if individual U.S. states are free to reach across their borders—indeed across national borders—and regulate the affairs of foreign companies through their U.S. partners.

State foreign policy regulations can also have the effect of undermining U.S. competitiveness as a result of the desire of individual states to regulate corporate conduct abroad. There is a danger that foreign countries will retaliate against U.S. companies generally for the actions of a few individual states. This Court has recognized the danger of foreign countries retaliating against "the Nation as a whole" for the actions of individual U.S. states. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 450 (1979). This risk of retaliation is borne by companies and individuals throughout the United States, most of which will lack access to the local California political process that initiated the dispute and without the political means to ameliorate the conflict. Out-of-state concerns and complaints typically fall on deaf ears, as California political actors have no incentive to pay heed to those who are not constituents. Yet California's deafness to national and international concerns puts companies nationwide at risk of retaliation.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully ask this Court to grant the petitions for writs of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Nos. 02-722 and 02-733

In the Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, ET AL.,
PETITIONERS

v.

HARRY LOW, INSURANCE COMMISSIONER,
STATE OF CALIFORNIA

GERLING GLOBAL REINSURANCE CORP. OF AMERICA,
ET AL., PETITIONERS

v.

HARRY W. LOW, INSURANCE COMMISSIONER,
STATE OF CALIFORNIA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a California statute that requires an insurance company doing business in the State to disclose information about each insurance policy issued by that company or an affiliate in Europe between 1920 and 1945 (1) violates the Commerce Clause, (2) violates the Due Process Clause, or (3) impermissibly interferes with the national government's exclusive power over foreign affairs.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The United States has engaged in extensive diplomatic efforts to assure that the Nations and enterprises responsible for the Holocaust provide some measure of compensation to their victims. In so doing, the United States has

consistently emphasized the desirability of voluntary, non-adversarial compensation mechanisms.

California has adopted a different approach—one that interferes with the national government's diplomatic efforts. The state statute at issue here, which is expressly addressed to transactions in Europe between 1920 and 1945, interferes with the national government's authority over foreign affairs is general, and with its traditional role in addressing claims arising out of international conflicts, in particular. After a petition for certiorari was filed at an interlocutory stage of this case, this Court invited the Solicitor General to express the views of the United States. *American Ins. Ass'n* v. *Low*, 534 U.S. 1120 (2002).[1] In light of the Court's prior invitation, and the court of appeals' subsequent entry of final judgment, the United States submits this brief *amicus curiae*.

STATEMENT

1. a. Since the end of World War II, the United States has committed substantial diplomatic resources toward achieving compensation for the victims of Nazism. The United States and its allies entered into treaties with the post-War governments of Germany and Austria that required them to provide compensation to such persons. See 02-722 Pet. App. (Pet. App.) 97a-98a. More recently, the United States has engaged in extensive international discussions concerning claims arising out of the Holocaust. As a result of those discussions, the United States has entered into executive agreements with Germany and Austria and has issued a joint statement with Switzerland.

With respect to insurance claims, the United States has sought expeditious compensation for Holocaust victims in accordance with the procedures established by the Inter-

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[1] Before the United States responded to the Court's invitation, the district court, on remand, entered final judgment in the case, and the petition was dismissed under this Court's Rule 46.

national Commission on Holocaust Era Insurance Claims (ICHEIC). ICHEIC is a voluntary organization formed by five European insurance companies (including petitioners Generali and Winterthur), the State of Israel, Jewish organizations, and the National Association of Insurance Commissioners.[2] It is chaired by former Secretary of State Lawrence S. Eagleburger. Through ICHEIC, Holocaust victims' insurance claims are processed and checked against European insurers' records in a manner consistent with European data protection laws. The State Department has stated that ICHEIC "should be recognized as the exclusive remedy for all insurance claims that date to the Nazi era" and has "encourag[ed] all insurance companies that wrote policies during the Nazi era to join the ICHEIC." Office of the Spokesman, U.S. Dep't of State, *International Commission on Holocaust Era Insurance Claims Begins Worldwide Effort to Identify Unpaid Claims* (Feb. 15, 2000); see Pet. App. 177a (statement of Ambassador Randolph M. Bell, Special Envoy for Holocaust Issues).

b. The United States' approach to the resolution of Holocaust victims' compensation claims, including insurance claims, is embodied in the executive agreement entered into between the United States and Germany two years ago. See Pet. App. 153a-168a. That agreement recognizes the creation of a foundation in Germany, funded with some $5 billion from public and private sources, to address Holocaust-era claims against German companies that were not addressed by earlier compensation laws. The German government agreed to supervise the activities of the foundation and to assure that the foundation publicizes its existence. *Id.* at 155a-156a (Art. 1, ¶¶ 2, 3). It also agreed that all claims by or on behalf of Holocaust victims against German insurance

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[2] The United States has observer status in ICHEIC. Several European countries, including Germany, France, Italy, Poland, and the Czech Republic, have observer status as well.

companies would be processed by those companies and the German Insurance Association based on ICHEIC procedures and additional procedures that may be agreed to among ICHEIC, the foundation, and the German Insurance Association. *Id.* at 156a (Art. 1, ¶ 4).

The United States, in turn, agreed to inform its courts that "it would be in [its] foreign policy interests * * * for the Foundation to be the exclusive remedy and forum for resolving [Holocaust-era] claims asserted against German companies." Pet. App. 156a (Art. 2, ¶ 1). The United States also agreed to "use its best efforts" with state and local governments to achieve an "all-embracing and enduring legal peace" with respect to such claims. *Ibid.* (Art. 2, ¶ 2).[3]

2. The State of California has taken a different approach to assuring compensation for Holocaust victims and their families, both in the statute at issue here, the Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code §§ 13800 *et seq.*, and several closely related statutes.

HVIRA requires the Commissioner of Insurance to establish a Holocaust Era Insurance Registry containing detailed information on insurance policies issued to Holocaust victims without regard to whether those victims ever lived in California. Cal. Ins. Code § 13803. The public is to have access to the Registry. *Ibid.* In order to obtain information for the

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[3] The executive agreement between the United States and Austria, which consists of an exchange of diplomatic notes and annexes, contains nearly identical undertakings. See *Exchange of Notes* Annex A, ¶ 14 (Jan. 23, 2001) <http://www.usembassy.at/en/policy/annexa.htm>. The joint statement of the United States and Switzerland similarly endorses ICHEIC and notes the "potentially disruptive and counterproductive effects of investigative initiatives or the threat or actual use of sanctions on a sub-federal level against insurers, including those that are * * * participants in [ICHEIC]." *Joint Statement Between the Government of the United States of America and the Government of the Swiss Confederation* (Jan. 29, 2000) <http://www.us-embassy.ch/NEWS/jointstatement.htm>.

Registry, HVIRA requires all insurers doing business in California to disclose information concerning "life, property, liability, health, annuities, dowry, educational, or casualty insurance policies," that were sold, "directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945." *Id.* § 13804(a). The disclosure obligation applies "whether the sale occurred before or after the insurer and the related company became related." *Ibid.* The information that an insurer must disclose includes "[t]he holder, beneficiary, and current status" of each policy, "[t]he city of origin, domicile, or address for each policyholder," and whether and how the policy proceeds have been paid. *Ibid.* The Commissioner must suspend the license of any insurer that fails to provide the information. *Id.* § 13806.

HVIRA declares that its requirements are "necessary to protect the claims and interests of California residents," including some 5600 Holocaust survivors living in the State, and "to encourage the development of a resolution to these issues through the international process or through direct action by the State." Cal. Ins. Code § 13801.

HVIRA is part of a statutory scheme designed to give California a central role in resolving Holocaust-era claims.[4] Another statute authorizes the Commissioner to suspend the license of an insurer upon finding that it, or any affiliate, failed to pay "any valid claim" on a policy issued to a person, whether or not a resident of the State, who was "a victim of persecution of Jewish and other peoples preceding and during World War II by Germany, its allies, or sympathizers." Cal. Ins. Code § 790.15(a) and (b)(1). It defines a "valid claim" to include claims not paid because the records were lost or the policies were confiscated by the Nazis. *Id.* § 790.15(b)(3).

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[4] See Assembly Bill No. 600 (Pet. App. 115a-122a) (noting interrelationship of HVIRA, the license-suspension provisions, Cal. Ins. Code § 790.15, and the jurisdictional provisions, Cal. Civ. Pro. Code § 354.5).

A third statute grants state courts venue and jurisdiction over such claims, and abolishes any statute-of-limitations defense if the claim is brought by December 31, 2010. Cal. Civ. Pro. Code § 354.5(b) and (c). It further provides that suits brought on these policies in California courts are "subject to California law" and that forum-selection provisions in the policies are unenforceable. 1998 Cal. Stat. ch. 43, § 2.

3. a. Petitioners, insurers that do business in California and that have European affiliates, brought suit against the Commissioner to challenge the constitutionality of HVIRA. The district court entered a preliminary injunction against the enforcement of the statute. The court held that petitioners had shown a probability of success on the merits of their claims that HVIRA impermissibly "interferes with the national government's exclusive power over external affairs," Pet. App. 95a-105a, and regulates extraterritorially in violation of the Commerce Clause, *id.* at 105a-110a.

b. The court of appeals rejected each of the constitutional grounds on which the preliminary injunction was based. Pet. App. 34a- 60a.

The court of appeals held that HVIRA, as an insurance regulation, is exempted from Commerce Clause scrutiny by the McCarran-Ferguson Act, 15 U.S.C. 1012(a). See Pet. App. 41a-45a. The court also suggested that HVIRA does not, in any event, regulate extraterritorially. The court reasoned that HVIRA "does not regulate the decision making authority of European insurance companies to pay or not to pay claims on European policies," but instead "requires California companies only to *provide information* about" such policies. *Id.* at 43a.

The court of appeals also held that HVIRA does not impermissibly interfere with the national government's authority over foreign affairs. Pet. App. 58a-59a. The court suggested that such interference could not appropriately be found because petitioners had made a "facial" challenge to

HVIRA, because HVIRA "mainly involve[s] foreign commerce," and because HVIRA is "not directed at a particular country." *Ibid.* The court remanded the case for consideration of petitioners' due process claim.

4. a. On remand, the district court permanently enjoined the enforcement of HVIRA. The court held that HVIRA violates the Due Process Clause by suspending insurers' licenses for not making the required disclosures, without enabling them to raise defenses such as a foreign law prohibition against disclosure. Pet. App. 78a-83a.

b. The court of appeals reversed. Pet. App. 1a-33a.

The court of appeals held that HVIRA does not violate due process constraints on California's legislative jurisdiction because HVIRA merely regulates the insurance industry within California. Pet. App. 9a. The court expressly declined to follow *Gerling Global Reinsurance Corp.* v. *Gallagher*, 267 F.3d 1228 (11th Cir. 2001), which invalidated a similar statute on due process grounds because of its extraterritorial reach. Pet. App. 9a-11a.

In addition, the court of appeals held that HVIRA does not violate due process by denying insurers an opportunity to defend against the suspension of their licenses. Pet. App. 20a-29a. The court also reiterated its earlier holdings sustaining HVIRA under the Commerce Clause and the foreign affairs power. *Id.* at 29a.

ARGUMENT

The court of appeals, in upholding a California statute that requires insurers doing business in the State to make sweeping disclosures about transactions that occurred exclusively in Europe between European parties, disregarded constitutional constraints on a State's authority to regulate extraterritorially and to inject itself into matters of foreign relations reserved to the President and Congress. The court of appeals' decision is inconsistent with this Court's decisions articulating those constraints under the Commerce Clause,

the Due Process Clause, and the foreign affairs power of the national government, and is in direct conflict with the Eleventh Circuit's recent decision invalidating a similar statute on due process grounds. In addition, the court of appeals' decision undermines the United States' effective conduct of foreign relations, including its continuing efforts to secure compensation for surviving Holocaust victims within their lifetimes. For these reasons, the petitions for a writ of certiorari should be granted.

I. HVIRA VIOLATES CONSTITUTIONAL PROHIBITIONS ON EXTRATERRITORIAL STATE REGULATION

Both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment prohibit a State from regulating activity outside its borders. HVIRA is such an extraterritorial regulation because it focuses exclusively on transactions in Europe before and during World War II and compels the disclosure of information about those transactions although they have "no jurisdictionally-significant relationship to [the State]." *Gerling Global Reinsurance Corp.* v. *Gallagher*, 267 F.3d 1228, 1238 (11th Cir. 2001).

A. The Commerce Clause And The Due Process Clause Prohibit States From Regulating Transactions Outside Their Borders

1. Under familiar Commerce Clause principles, California may not require corporations to adhere to its standards in other States or Nations as a condition of doing business in California. See, *e.g.*, *BMW of N. America, Inc.* v. *Gore*, 517 U.S. 559, 572 (1996) (a State may not "impose economic sanctions on violators of its laws with the intent of changing the [violator's] lawful conduct in other States"); *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989) (the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's

borders"). A state law does not cease to be extraterritorial merely because it has some nexus to local persons or activities. Such a law is impermissibly "extraterritorial" for purposes of the Commerce Clause if it has "the practical effect of * * * control[ling] conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336.

The Commerce Clause's prohibition on a State's regulation of conduct beyond its borders protects against "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 336-337. When, as here, a State seeks to project its regulatory regime into the jurisdiction of another Nation, the potential is particularly great for inconsistent legislation and resulting conflict, as well as for interference with United States foreign policy. Cf. *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (even *federal* laws must clearly indicate that they are to apply extraterritorially to "protect against unintended clashes between our laws and those of other nations which could result in international discord").[5]

2. A State is also constrained by the Due Process Clause from regulating contracts or transactions that do not have a significant relationship to its legitimate interests. See, *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 818-819 (1985); *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 407-408 (1930). In *Dick*, for example, the Court held that a Texas insurance statute could not, consistent with due process, be applied to invalidate a provision contained in a policy that had been issued in Mexico and was to be performed there. See 281

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[5] In addition, the Commerce Clause protects against state regulation, whether or not viewed as extraterritorial, that prevents the United States from "speak[ing] with one voice when regulating commercial relations with foreign governments." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 449 (1979). As discussed below (at 16-19), HVIRA presents that constitutional deficiency as well.

U.S. at 408. The Court explained that, because all acts relating to the making and performance of the policy occurred outside the State, "Texas was therefore without power to affect the terms of contracts so made." *Ibid.*; see *id.* at 408 n.5 ("[A] State is without power to impose either public or private obligations on contracts made outside of the state and not to be performed there."); *Shutts*, 472 U.S. at 821 (a State cannot apply its own law to "a transaction with little or no relationship to the [State]").

Those cases make clear that a State is not entitled under the Due Process Clause to regulate out-of-state transactions simply because some parties to those transactions reside within the State. Indeed, the policyholder in *Dick* was a citizen and permanent resident of Texas, although he engaged in all conduct relevant to the policy while in Mexico. The Court held that Texas did not have a sufficient relationship to the policy to permit the State to regulate it. See 281 U.S. at 408. And, in *Shutts*, the Court held that Kansas could not apply its law to out-of-state plaintiffs' claims with respect to out-of-state leases, although the defendant did business in the State. See 472 U.S. at 818-819.

B. HVIRA, By Imposing Disclosure Requirements With Respect To Out-Of-State Transactions Between Out-Of-State Parties, Is An Impermissible Extraterritorial Regulation

1. Whether analyzed under the Commerce Clause or the Due Process Clause, HVIRA is an impermissible extraterritorial regulation. Its "practical effect" is to compel "conduct beyond the boundaries of the State," *Healy*, 491 U.S. at 336—specifically, the collection, compilation, and disclosure of information, presumably located in Europe, concerning transactions that occurred exclusively in Europe between European parties. There is no nexus between those transactions and the legitimate interests of California that permits the State to exercise regulatory authority over

them. It is especially evident that HVIRA exceeds the proper legislative jurisdiction of the State because the statute is not one of general applicability that happens to have an extraterritorial effect; instead, HVIRA is specifically directed at transactions that occurred in Europe during a time of international conflict.

The conclusion that HVIRA is an unconstitutional exterritorial regulation is confirmed by "considering how [such laws] may interact with the legitimate regulatory regimes of other States," *Healy*, 491 U.S. at 336, and Nations. It is plain that HVIRA has the potential to interfere with other jurisdictions' laws limiting the disclosure of private information concerning insurance policies issued in those jurisdictions. As the court of appeals recognized, an insurer that fails to disclose the information required by HVIRA will have its California license suspended, even if "disclosure pursuant to HVIRA [would] violate[] European data protection laws." Pet. App. 25a.

2. The court of appeals reasoned that HVIRA is not an impermissible extraterritorial regulation because it does "not seek to regulate the substance of out-of-state transactions." Pet. App. 15a (addressing due process challenge); accord *id.* at 43a (addressing Commerce Clause challenge). The court viewed HVIRA as "requir[ing] California insurers *only to disclose information about* their foreign transactions or those of their affiliates." *Id.* at 16a.

The court of appeals' reasoning rests on the erroneous premise that "[a] request for information is simply not equivalent" to a regulation. Pet. App. 16a. A requirement that a person disclose, or refrain from disclosing, confidential information is regulatory in nature. It imposes a substantive obligation on that person, the violation of which carries adverse consequences. See *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 28 (1990) (describing "rules which require regulated entities to disclose information" as "[a]mong the

regulatory tools available to [the] Government"); see also *BMW*, 517 U.S. at 572-573 (a State may not impose sanctions for failure to follow its disclosure standards in other States); *Gallagher*, 267 F.3d at 1238 (observing that the disclosure provisions of a similar statute "pertain to, and as a practical matter unquestionably seek to regulate," Holocaust-era policies). Indeed, the tension between HVIRA and European privacy laws belies any claim that disclosure or privacy laws do not regulate or present Commerce Clause and Due Process Clause difficulties.

The court of appeals suggested that HVIRA is constitutionally justified by the State's purpose to "protect[] its residents from insurance companies that have not paid valid claims." Pet. App. 16a. A State cannot evade limits on extraterritorial legislation merely by deeming a corporation's conduct abroad relevant to its ability to perform within the State. More broadly, a statute with an impermissible extraterritorial effect cannot be saved by identifying an arguably permissible domestic purpose. In any event, the express purpose of HVIRA is to facilitate the resolution of claims on policies issued in Europe before and during World War II, rather than to assess the fitness of insurers to do business in California today. See Cal. Ins. Code § 13801(d) and (e) (HVIRA is designed "to ensure the rapid resolution of * * * questions" concerning "insurance policies held by Holocaust victims and survivors," so as to "eliminat[e] the further victimization of these policyholders and their families"); see also pp. 5-6, *supra* (discussing related statutes directed at facilitating such claims). By contrast, HVIRA makes no mention of the purpose that the court posited.

Nor do any other features of HVIRA suggest that its purpose or primary operative effect is to enable the Commissioner to verify the *bona fides* of insurers doing business in the State. To the contrary, HVIRA requires insurers to

provide information for a public Holocaust Era Insurance Registry. Moreover, the information sought by HVIRA is too remote, too dated, and, at the same time, too detailed to support the court of appeals' posited purpose. That information is tailored to the payment of past European claims, not to the assessment of current in-state performance. Indeed, the Commissioner already has broad statutory authority to gather information to assess the "fairness and honesty of methods of doing business" of any insurer that seeks to do business in the State. Cal. Ins. Code §§ 717 (qualifications of license), 733 (authority to examine "all [the insurer's] affairs"), 1215.6 (authority to obtain documents in possession of "the insurer or its affiliates").

3. The Ninth Circuit's decision upholding HVIRA under the Due Process Clause cannot be reconciled with the Eleventh Circuit's decision in *Gallagher* invalidating a similar Florida statute. In *Gallagher*, as here, the statute required each insurer doing business in the State to disclose extensive information concerning policies issued by itself or its affiliates in Europe between 1920 and 1945. See 267 F.3d at 1229-1230. The Eleventh Circuit held that the statute "exceed[ed] the constitutionally permissible regulatory authority of the Florida legislature" under the Due Process Clause, because the statute required "Florida insurers * * * to produce and compile information regarding transactions between non-Florida residents that occurred entirely outside Florida." *Id.* at 1234; see *id.* at 1238 (recognizing that "there is virtually *no* connection between the State of Florida" and the subject of the disclosure statute, *i.e.*, "insurance transactions involving [domestic insurers'] German affiliates that took place years ago in Germany, among Germany residents, under German law, relating to persons, property, and events in Germany").[6]

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[6] None of the grounds on which the Ninth Circuit attempted to distinguish *Gallagher* from this case is persuasive. For example, the Ninth

4. The court of appeals held that HVIRA was shielded from Commerce Clause scrutiny by Section 2(a) of the McCarran-Ferguson Act, 15 U.S.C. 1012(a), which provides that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." See Pet. App. 40a-45a. That holding is inconsistent with this Court's recognition in *FTC* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960), that the McCarran-Ferguson Act was not intended to "authorize state regulation of extraterritorial activities." *Id.* at 301; see *id.* at 300 ("Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated."). The Court explained that a contrary construction of the Act would raise serious constitutional questions, *id.* at 302, and undermine Congress's "basic motivating policy" of leaving the regulation of insurance to those "in close proximity to" the people and policies regulated, *id.* at 301-302.[7]

Circuit suggested that the Florida statute, in contrast to HVIRA, sought information directly from "both local and foreign entities." Pet. App. 9a-10a. In fact, the Florida statute, like HVIRA, applies directly only to "[a]ny insurer doing business in th[e] state." *Gallagher*, 267 F.3d at 1230. In addition, the Ninth Circuit suggested that the Eleventh Circuit did not consider whether the Florida statute could be justified as a means of assessing insurers' fitness to do business in the State. See Pet App. 10a. In fact, the Eleventh Circuit noted the State's "litigating position" that the statute could be so justified, but concluded that the text and structure of the statute did not support that position. See *Gallagher*, 267 F.3d at 1239-1240. The Ninth Circuit further suggested that the Florida statute was distinguishable because it "contained both disclosure and substantive elements" governing Holocaust-era claims. Pet. App. 10a- 11a. The legislation that enacted HVIRA, however, likewise contained other provisions to facilitate the litigation of such claims. See *id.* at 117a-118a.

[7] As the court of appeals observed (Pet. App. 41a), *Travelers* arose under an exception to the McCarran-Ferguson Act that provides that certain Acts of Congress "shall be applicable to the business of insurance to

II. HVIRA IMPERMISSIBLY INTRUDES INTO MATTERS OF FOREIGN RELATIONS RESERVED TO THE NATIONAL GOVERNMENT

1. This Court has repeatedly emphasized that "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448 (1979); see, *e.g.*, *United States* v. *Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941) ("The Federal Government * * * is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties."). The national government's preeminent role in acting for the United States in the international arena is reflected in the Constitution's express grants of power to Congress, see, *e.g.*, Art. I, § 8, Cls. 1, 3, 11 (powers to "provide for the common Defence," "regulate Commerce with foreign Nations," and "declare War"), and to the President, see, *e.g.*, Art. II, §§ 2, 3 (powers to serve as "Commander in Chief of the Army and Navy," "make Treaties," "appoint Ambassadors," and "receive Ambassadors"), and in its express restraints on state power, see, *e.g.*, Art. I, § 10 (restrictions on States' "enter[ing] into any Treaty, Alliance, or Confederation," "lay[ing] any Imposts or Duties on Imports or Exports," "enter[ing] into any Agreement * * *

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the extent that such business is not regulated by State Law." 15 U.S.C. 1012(b). The exception is the mirror image of the general rule in 15 U.S.C. 1012(a) that "[t]he business of insurance * * * shall be subject to the laws of the several States which relate to the regulation * * * of such business." Nothing in the text, structure, or history of the McCarran-Ferguson Act provides any reason to view the scope of the States' authority to regulate insurance differently under the two similarly worded provisions.

with a foreign Power," and "engag[ing] in War"). The national government has traditionally exercised such power in dealing with foreign governments with respect to the resolution of claims in the wake of international conflict. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 679 (1981).

In light of the "imperative[] * * * that federal power in the field affecting foreign relations be left entirely free from local interference," *Hines*, 312 U.S. at 63, state "regulations must give way if they impair the effective exercise of the Nation's foreign policy." *Zschernig* v. *Miller*, 389 U.S. 429, 440 (1968); see *Japan Line*, 441 U.S. at 449 (state regulations may not prevent the United States from "speak[ing] with one voice when regulating commercial relations with foreign governments"). This Court has struck down such state regulations, "even in [the] absence of a treaty" or an Act of Congress, *Zschernig*, 389 U.S. at 441, as inconsistent with the Constitution's assignment to the national government of the authority to conduct foreign relations or, in the commercial area, as inconsistent with the Foreign Commerce Clause. See, *e.g.*, *Japan Line*, 441 U.S. at 452-453 (foreign commerce); *Zschernig*, 389 U.S. at 436 (foreign affairs); *Chy Lung* v. *Freeman*, 92 U.S. 275 (1875) (same).

2. HVIRA intrudes into matters of foreign relations exclusively reserved to the national government. The resolution of claims arising out of the Nazi era in Europe has long been a subject of United States diplomatic attention. In the context of still-unresolved claims against foreign enterprises arising out of the Holocaust, the President has determined that it is preferable for such claims to be pursued through non-adversarial processes rather than litigation. The President has concluded that such an approach serves the interests of Holocaust victims and their families as well as the United States' interest in cooperative relations with its European allies.

In particular, the United States, in its executive agreements with Germany and Austria and its other recent diplomatic efforts, has encouraged the use of ICHEIC as the exclusive mechanism for resolving Holocaust-era insurance claims. Those agreements do not, of their own force, extinguish or bar any claims that Holocaust victims or their families might assert in court against German and Austrian companies. They do make clear, however, that United States policy disfavors the imposition of further obligations on companies subject to the agreements, whether through regulation or litigation, beyond those contemplated by the agreements themselves. Thus, the executive agreement between the United States and Germany recognizes that it is "in the[] interests" of the two governments for the designated claims process "to be the exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II." Pet. App. 155a (Art. 1, ¶ 1).

HVIRA threatens to "impair the effective exercise," *Zschernig*, 389 U.S. at 440, of United States policy with respect to Holocaust-era claims. As explained above, the United States has sought to achieve voluntary participation in international claims processes and to encourage the exclusive use of those processes as an expeditious, fair, and comprehensive alternative to litigation. State laws such as HVIRA are not laws of general applicability with an incidental effect on the federal government's ongoing efforts. To the contrary, they are expressly and specifically directed at establishing competing processes with their own disclosure requirements and potentially their own forums and remedies for Holocaust-era claims. Such laws impose "a different, state system of economic pressure," *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 376 (2000), and may impede the implementation and operation of the

international claims processes. See, *e.g.*, *Joint Statement*, note 3, *supra*, (noting the "potentially disruptive and counterproductive effects" of such laws). At a minimum, such laws "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Crosby*, 530 U.S. at 381. They also generate the very tensions in foreign relations that the United States has sought to avoid. For example, the United States has received protests from Germany and Switzerland concerning HVIRA's application to insurance policies written in those countries.

3. In declining to invalidate HVIRA as inconsistent with the national government's authority over foreign affairs, the court of appeals attempted to distinguish this case from *Zschernig*. None of its suggested distinction bears on whether HVIRA is an impermissible "intrusion by the State into the field of foreign affairs which the Constitution entrusts in the President and the Congress." *Zschernig*, 389 U.S. at 432.

For example, the court of appeals observed that the Court invalidated the state probate statute in *Zschernig* only after the statute had disrupted foreign relations. See Pet. App. 56a-59a. Nothing in *Zschernig* suggests that a state statute cannot be invalidated until its adverse impact on foreign relations has been fully manifested. And, in *Chy Lung*, the Court invalidated a state statute, without any inquiry into its actual impact, on the ground that the statute, by its nature, would create international tension. See 92 U.S. at 279. In any event, as the protests from Germany and Switzerland demonstrate, HVIRA has, in fact, affected the United States' foreign relations.

The court of appeals also sought to distinguish *Zschernig* on the grounds that HVIRA "involve[s] foreign commerce" and is "not directed at a particular country." Pet. App. 59a. To the extent that those observations accurately distinguish

Zschernig, they suggest that HVIRA is more, not less, constitutionally problematic. A state statute that interferes with the United States' *commercial* relations with other Nations may be invalid under *both* the Foreign Commerce Clause and the foreign affairs power. See *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 53-55, 68-69 (1st Cir. 1999) (invalidating state statute on both foreign affairs and foreign commerce grounds), aff'd on other grounds, 530 U.S. 363 (2000). Nor need a state statute be "directed at a particular country" to be invalidated under the foreign affairs power. No such statute was involved in *Chy Lung* or *Zschernig*. Moreover, HVIRA is clearly directed at insurance policies issued to persons in certain European countries, which explains why it has drawn objections from two of those countries and which makes its interference with foreign affairs even more manifest.

Finally, the court of appeals erred in refusing, based on a misunderstanding of *Barclays Bank PLC* v. *Franchise Tax Board*, 512 U.S. 298 (1994), to consider the views of the Executive Branch regarding the foreign policy ramifications of HVIRA. See Pet. App. 55a. As this Court has explained, *Barclays* addressed an unusual situation in which Congress and the Executive had taken divergent positions. See *Crosby*, 530 U.S. at 385-386. *Crosby* reaffirms the central importance in other situations of the President's views in exercising his constitutional responsibility "to speak for the Nation with one voice in dealing with other governments." *Id.* at 381, 385-386.[8]

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[8] The court of appeals incorrectly viewed the Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611, as a congressional endorsement of state statutes such as HVIRA. See Pet. App. 47a-50a. The Act establishes a commission to address the disposition of certain Holocaust-era assets that "came into *the possession or control of the Federal Government*" after January 30, 1933. § 3(a)(1), 112 Stat. 612 (emphasis added). It directs the commission to "encourage the National

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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Association of Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign, *doing business in the U.S.* at any time after January 30, 1933," that issued an insurance policy to "any individual on any list of Holocaust victims." § 3(a)(4)(A), 112 Stat. 612 (emphasis added). It states that the report should include, "to the degree the information is available," the "number of policies issued by each company" to Holocaust victims, the "value of each policy at the time of issue," the "total number of policies and the dollar amount[s] that have been paid out," and the "total present-day value of assets in the United States of each company." § 3(a)(4)(B), 112 Stat. 613. Nothing in the Act imposes reporting requirements on insurers under threat of sanctions, confers any new authority on the States to do so, or seeks the sort of private information that may be protected from disclosure under foreign law.

* The Solicitor General is recused in this case.

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IN THE

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, *et al.*,
Petitioners,

v.

HARRY LOW, COMMISSIONER OF INSURANCE
FOR THE STATE OF CALIFORNIA,
Respondent.

GERLING GLOBAL REINSURANCE CORP. *et al.*,
Petitioners,

v.

HARRY LOW, COMMISSIONER OF INSURANCE
FOR THE STATE OF CALIFORNIA,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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The Federal Republic of Germany respectfully submits this brief as amicus curiae in support of the petitions for writs of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in *Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739 (2001), and *Gerling Global Reinsurance Corp. of America v. Low*, 296 F.3d 832 (2002).[1]

INTEREST OF AMICUS CURIAE

The Federal Republic of Germany has a very strong interest in this case, as reflected by its prior participation as an amicus curiae, because the California regulatory statute at issue, the Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"),[2] has a manifestly adverse impact on the Federal Republic's sovereign interests and on its foreign relations with the United States of America. In addition, the HVIRA, if enforced, would require German companies who themselves do no business in California to violate German privacy laws. The Federal Republic submits this amicus curiae brief to make clear the extent to which actions of the State of California infringe on the sovereignty of the Federal Republic in these matters and impair the ability of the Federal Republic to engage in diplomatic relations with the United States.

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[1] Petitioners and respondent have consented to the filing of this brief; their letters of consent are on file with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Federal Republic of Germany, made a monetary contribution to the preparation or submission of this brief.

[2] Cal. Ins. Code §§ 13800-13807 (SER 516-524). "ER" refers to the Excerpts of Record in the preliminary injunction appeal, and "SER" refers to the Supplemental Excerpts of Record in the permanent injunction appeal.

SUMMARY OF ARGUMENT

The Ninth Circuit's decisions upholding the actions of the State of California affront the sovereignty of the Federal Republic. Its sovereign interests are neither marginal nor academic—the question of restitution and compensation for victims of the National Socialist era and World War II is of the utmost importance for Germany, both as a matter of domestic and foreign policy. Germany has worked constructively with the United States and other members of the international community for over 55 years to structure and provide over $100 billion in compensation to victims.

The HVIRA directly interferes with implementation of the most recent international agreements—the July 17, 2000 "Berlin Agreements"[3]—pursuant to which the Federal Republic and German companies agreed to create a Foundation to provide DM 10 billion (approximately $5 billion) in additional compensation to victims, including those whose insurance policies from the National Socialist era may have been unpaid. By international accord, the Foundation is to be the exclusive remedy and forum for all asserted claims, including insurance-related claims.[4]

Not content with U.S. foreign policy and international agreements on Holocaust-era insurance claims that promote conciliation and legal peace, the State of California has pursued its own more aggressive "foreign policy," attempting to regulate how insurance companies in Germany (and

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[3] Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning the Foundation, "Remembrance, Responsibility and the Future," July 17, 2000 ("Executive Agreement") (ER 818-37, SER 1447-53); Joint Statement on Occasion of the Final Plenary Meeting Concluding International Talks on the Preparation of the Foundation, "Remembrance, Responsibility and the Future," July 17, 2000 ("Joint Statement") (ER 812-16).

[4] *See* Executive Agreement, art. 1(1), 1(4) (ER 821-22).

elsewhere in Europe) should address the consequences of the National Socialist era and World War II and attempting to set up California courts as a forum for contentious litigation regarding such claims. Seeking to leverage its regulatory authority over California insurance companies to regulate the conduct of insurance companies overseas, the State of California enacted a statute that threatens to revoke the license of any California insurance company whose German (or other European) affiliates fail to place in a public registry established by the State of California extensive information, including personal data, regarding every insurance policy issued in Europe to Europeans between 1920 and 1945.

The Ninth Circuit decisions upholding the HVIRA directly conflict with decisions of other Circuits and violate well-established legal principles: (a) by holding, in the first decision, that the HVIRA did not violate limits imposed on state power by the reservation to the federal government of the Foreign Affairs power and by the dormant Foreign Commerce Clause of the U.S. Constitution; and (b) by holding, in the second decision, that the HVIRA did not exceed limits imposed on state power by the Due Process Clause of the U.S. Constitution to legislate with respect to matters outside its boundaries. Certiorari is necessary and appropriate because the Ninth Circuit's decisions, if left unreviewed and uncorrected, would endorse the State of California's intrusion on German sovereignty and impede the Federal Republic's ability to engage in diplomatic relations with the United States as a unitary political entity.

ARGUMENT

1. German Sovereign Interests Regarding the Regulation of German Insurance Companies and Data Protection

The Federal Republic has sovereign authority to regulate insurance companies in Germany. The Federal Republic has enacted an extensive statutory framework, including the

Insurance Supervision Law (Versicherungsaufsichtsgesetz or VAG). The VAG designates the Federal Financial Services Supervisory Office (Bundesanstalt für Finanzdienstleistungsaufsicht (BAFIN), formerly known as Bundesaufsichtsamt für das Versicherungswesen (BAV)) as the competent supervisory body of the federal government for the regulation of insurance in Germany and grants the BAFIN significant powers to regulate the German insurance market. §§ 81-103 VAG.

German insurance companies are also subject to other provisions of German law, including German privacy laws such as the Federal Data Protection Law (Bundesdatenschutzgesetz or BDSG). Germany, like most European countries, has "data protection" laws that are typically far more stringent than in the United States and reflect a strong social policy against dissemination of private information that may be in governmental or corporate records. The BDSG prohibits the disclosure of personal data, including the disclosure of certain information regarding insurance policy records by German insurance companies without the express authorization of policyholders or their beneficiaries. § 28(2) Nr. 1b BDSG.

As the Federal Republic advised the Ninth Circuit,[5] the relevant German regulatory agencies have concluded that compliance by German companies with the HVIRA would cause them to violate German law and thereby become subject to civil and criminal penalties.[6] As the Federal Republic informed the Ninth Circuit, these are correct

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[5] Brief Amicus Curiae Supporting Affirmance of Summary Judgment for Plaintiffs-Appellees/Cross-Appellants (filed March 18, 2002) ("March 18, 2002 FRG Brief") at 15-17.

[6] The District Government of Cologne, Germany, concluded on May 16, 2000, that under the BDSG "the transmission of data in the form of lists pertaining to all policyholders from 1920-1945 . . . *is not permissible*." (ER 1182) (emphasis added).

conclusions under German law.[7] The HVIRA purports to require public disclosure in California of all policies issued in Europe between 1920 and 1945, necessarily revealing personal and confidential information regarding a million or more policies held by persons who were not victims of National Socialist persecution.

2. German Sovereign Interests Regarding Post-War Restitution and Compensation Programs

The question of restitution and compensation for Holocaust victims, including payments on unpaid insurance policies, has been an overarching concern of the Federal Republic since the end of the World War II. As the first German Chancellor, Konrad Adenauer, acknowledged fifty years ago: "[U]nspeakable crimes have been committed, and they demand restitution, both moral and material."[8] Accordingly, since its founding in 1949, the Federal Republic has sought to address the heinous wrongs committed during the National Socialist era and World War II, with full awareness that no amount of money will ever be enough to atone for those crimes.

In accordance with established principles of international law and custom, Germany and the international community have dealt with the question of restitution and compensation exclusively on a governmental and intergovernmental basis pursuant to international agreements among Germany, the United States, and other sovereign nations and pursuant to German domestic legislation. The Federal Republic entered into a series of international agreements after the war regarding restitution and compensation for victims of the National Socialist era and World War II with all Western European nations, the United States, and Israel. After the fall

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[7] March 18, 2002 FRG Brief at 17.

[8] Germany Online, "German Compensation for National Socialist Crimes," *at* http://www.germany-info.org/newcontent/np.bak/np_3g.html (last visited Dec. 12, 2002).

of the Iron Curtain, Germany reached comparable agreements with Eastern European nations.

Pursuant to its international obligations, the Federal Republic enacted legislation establishing extensive restitution and compensation programs over the past 55 years to remedy the wrongs committed during the National Socialist era and World War II. As part of these programs, Germany returned all real estate and other assets capable of being restored to their rightful owners, including 700,000 objects of art and 2.5 million books; paid over two million claims for assets that could not be returned including virtually all insurance policies; and reached global settlements with Jewish survivor organizations with respect to those victims who died without heirs or did not file compensation claims. To date, the Federal Republic has paid roughly $100 billion in compensation and continues to pay about $600 million annually to about 100,000 pensioners.[9] The United Nations has applauded the Federal Republic's restitution and compensation programs as "[t]he most comprehensive and systematic precedent of reparation by a Government to groups of victims for the redress of wrongs suffered . . . ."[10]

3. German-U.S. Agreement on a German Foundation

Germany's consistent practice of addressing the consequences of the National Socialist era on a governmental and intergovernmental basis culminated in the year 2000 in an international agreement between the Federal Republic and the United States on the creation of a German Foundation to provide a further measure of relief to aging victims, including those who suffered at the hands of German companies. *See*

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[9] *See id.*

[10] *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess., Provisional Agenda Item 4, at 55, ¶ 107, U.N. Doc. E/CN.4/Sub. 2/1993/8.

Executive Agreement (ER 818-37, SER 1447-53). This Agreement resulted from nearly two years of negotiations under the leadership of Chancellor Schröder and President Clinton. The twin objectives of the Executive Agreement are "to complement the creation of the Foundation and to foster all-embracing and enduring legal peace for German companies with respect to the National Socialist era and World War II." *Id.*, art. 3(1) (ER 824).

The German Parliament (Bundestag) established the Foundation pursuant to the Foundation Law as an instrumentality of the Federal Republic.[11] It is endowed with assets of $5 billion, half contributed by the Federal Republic and half on a voluntary basis by thousands of German companies. The Foundation will provide payments to over a million aging victims of National Socialist oppression and persecution, specifically including payments on any insurance policies that remain unpaid notwithstanding the earlier extensive post-war restitution and compensation programs. The Executive Agreement declares that it is in the foreign policy interests of the Federal Republic and the United States for the Foundation to be the exclusive remedy and forum for addressing all claims, including insurance claims, asserted against German companies arising from the National Socialist era and World War II. *See* Executive Agreement, arts. 1(1), 1(4) (ER 820-22).

Article 1(4) of the Executive Agreement provides that any remaining unpaid insurance policies that come within the claims-handling procedures adopted by the International Commission on Holocaust-Era Insurance Claims (ICHEIC) as of July 2000 will be processed by German companies "on the basis of such procedures and on the basis of additional claims handling procedures that may be agreed among the

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[11] *See* German Federal Law on the Creation of a Foundation "Remembrance, Responsibility and the Future," *available at* http://www.stiftung-evz.de/fremdsp/englisch/st_ges_en.html (enacted Aug. 12, 2000) ("Foundation Law").

Foundation, ICHEIC, and the German Insurance Association." *Id.*, art. 1(4) (ER 822). On October 16, 2002, the Foundation, ICHEIC, and the German Insurance Association signed an agreement regarding such claims handling procedures and the publication of pertinent insurance records, in a manner that satisfies the requirements of European data protection laws. (Lodg. L70-L89). On October 17, 2002, U.S. State Department spokesman Richard Boucher explained that "[t]he United States continues to support the work of the Foundation, including through fulfillment of its obligations under the July 2000 U.S.-German Executive Agreement. This insurance agreement is the result of ongoing international efforts to address the injustices of World War II and the National Socialist era. The United States continues to support efforts to resolve matters of Holocaust restitution and compensation through cooperative means outside of litigation." U.S. Department of State, Press Statement, *at* http://www.state.gov/r/pa/prs/ps/2002/14455.htm (Oct. 17, 2002).

The Berlin Agreements recognize that "for the last 55 years the parties have sought to work to address the consequences of the National Socialist era and World War II through political and governmental acts" and that "this Agreement and the establishment of the Foundation represent a fulfillment of these efforts." Executive Agreement, preamble (ER 821). The Executive Agreement further states that the Federal Republic and the United States agree that "both parties desire all-embracing and enduring legal peace to advance their foreign policy interests." *Id.* (ER 820). Consistent with German and U.S. foreign policy, the Foundation Law excludes further claims, *see* Foundation Law § 16(1), and the Executive Agreement obligates the United States to take steps both in court and with state and local governments to foster all-embracing and enduring legal peace for German companies. *Id.*, arts. 2(1) and 2(2) (ER 822-23; 832-35).

This bilateral German-U.S. agreement was accompanied by a Joint Statement signed by the Federal Republic, the United States, Israel, five Central and Eastern European nations, the Conference on Jewish Material Claims against Germany, and other interested parties reflecting an international consensus that it is in all parties' interests for the Foundation to be the exclusive remedy and forum for the resolution of all National Socialist era and World War II claims against German companies and that German companies should receive all-embracing and enduring legal peace. *See* Joint Statement, preamble, arts. 4(b) & (c) (ER 812-16).

4. California's Regulation of Conduct with No Connection to California

Dissatisfied with the efforts of sovereign nations and other parties reflected in this international consensus, the State of California enacted the HVIRA and related legislation in 1999 as part of its own incompatible policy of promoting litigation in California courts as a means to redress National Socialist era and World War II wrongs. The HVIRA threatens to revoke the license of any insurance company doing business in California unless it provides for publication in California extensive personal information regarding each insurance policy issued by any German (or other European) "related" affiliate that sold insurance policies in Europe between 1920 and 1945, even if the affiliate never had any connection to the State of California and even if its relationship to a California licensee began long after the war. HVIRA §§ 13804, 13806 (SER 520-21, 523). The HVIRA thus mandates disclosure of a million or more policies held by persons who were not victims of National Socialist persecution. The detailed information required by the HVIRA includes, for each of these policies: the names of the policyholders and beneficiaries; the "current status" of the policy; and the "city of origin, domicile, or address" for each policyholder. HVIRA § 13804(a) (SER 520). Related

California legislation purports to create a California cause of action to recover on Holocaust-era insurance claims and further purports to waive applicable statutes of limitation in conflict with German statutory law.

The HVIRA's extraterritorial reach is vast. It seeks to regulate insurance companies and policies that have no nexus with the State of California: the insurance companies that issued policies between 1920 and 1945 were in Germany (or elsewhere in Europe), and they issued policies in Germany (or elsewhere in Europe). Nothing in the HVIRA requires that the policyholders or beneficiaries have any connection with the State of California. California's attempt to regulate entities and transactions that have no connection to the state violates international law regarding the limits of legislative jurisdiction and the Due Process Clause of the U.S. Constitution.

5. California's Conflicting "Foreign Policy"

The HVIRA directly contravenes German legislation. By threatening to suspend the license of California insurance companies unless "related" insurance companies in Germany agree to the publication in California of detailed information concerning German and other European policies, the HVIRA seeks to supplant the Federal Republic's regulation of insurance companies in Germany with the supposedly more reasoned judgment of the State of California, directly implying that the Federal Republic cannot be trusted to perform its sovereign duties. Furthermore, the HVIRA requires California affiliates to disclose information held by related German insurance companies notwithstanding applicable German privacy laws governing disclosure of the required information. *See* § 28(2) Nr. 1b BDSG. Unauthorized disclosure may result in civil and criminal penalties for German insurance companies, and the State of California's requirement that this information be published raises issues with no obvious solution.

The HVIRA has a direct, significant effect on Germany: if German insurance companies fail to comply with the publication requirements, the California insurance companies to which they are now affiliated (some 55 to 80 years after the issuance of the policies) will lose their licenses to do business in the State of California. The State of California has thus improperly leveraged its regulatory authority over insurance companies doing business in California to regulate the conduct of "related" insurance companies in Europe that have never done business in the state and are under the regulatory jurisdiction of Germany.

The HVIRA is also directly at odds with the German-U.S. Agreement and seeks to second-guess over 55 years of intergovernmental and governmental measures undertaken by the Federal Republic, the United States, and other sovereign nations to address the consequences of the National Socialist era and World War II. The HVIRA seeks to implement California's own "foreign policy" by replacing the international consensus on nonconfrontational resolution through the German Foundation with a scheme premised on coerced publication and litigation in California courts.

The puzzling assertions in the panel's first decision that (a) "there is no evidence that HVIRA would be applied in a way that would implicate the diplomatic concerns mentioned in *Zschernig*,"[12] and (b) "HVIRA and the executive branch initiatives [including the Executive Agreement] share the same policy objective, although they seek to achieve that policy objective by varying techniques"[13] are remarkably erroneous. It simply cannot be that a policy of the United States Government expressly recognizing that it is in the United States' foreign policy interests for the German

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[12] *Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739, 753 (9th Cir. 2001) (citing *Zschernig v. Miller*, 389 U.S. 429 (1968)).

[13] *Id.* at 750.

Foundation to be the *exclusive remedy and forum* and seeking to end all litigation in United States courts of National Socialist era claims shares the same objective as a California regulatory statute that seeks to force publication of information to set up the California state courts as a second forum for contentious litigation of the same claims; nor is there any way rationally to conclude that the California statute does not implicate United States Government diplomatic concerns that mirror those of the Federal Republic. The panel arbitrarily turned a blind eye to the submissions of both the Federal Republic and the United States, which convincingly proved just the opposite. As the amicus brief of the United States quite plainspokenly said, "the premise of the California legislation is in direct conflict with that of United States foreign policy."[14]

The Ninth Circuit's decisions cloud the ability of the Federal Republic to engage in productive negotiations with the United States by impairing the ability of the United States to speak with one voice on matters of foreign affairs and foreign commerce. The diplomatic, economic, and other foreign policy factors that the Federal Republic, the United States, and the other sovereign nations weighed in reaching the international consensus on the establishment of the Foundation and legal peace for German companies extend well beyond any possible interests of the State of California.

The Ninth Circuit's decisions, if left unreviewed, would also invite other states to substitute their own foreign policy objectives for that of the United States, opening the door to intrusive and potentially inconsistent regulation of insurance companies in Germany by 50 separate states. At least six

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[14] Brief for Amicus Curiae the United States of America in Support of Rehearing *En Banc* (filed Aug. 5, 2002) (ER 1255-77).

states in addition to California (Florida,[15] Maryland, Minnesota, New York, Texas, and Washington) have enacted legislation—and at least four other states (Illinois, Massachusetts, New Jersey, and Rhode Island) have introduced legislation—to regulate in potentially inconsistent ways foreign insurance companies that issued policies in Europe over 55 years ago. Several of these states took legislative action soon after the Ninth Circuit's first decision.

6. The Need for Review of the Ninth Circuit's Decisions

The decisions of the Ninth Circuit affront German sovereignty every day they remain unreviewed and uncorrected. The Ninth Circuit's decisions were particularly offensive in failing even to acknowledge the position of the Federal Republic (and the United States) set forth in four amicus curiae briefs filed with the Ninth Circuit. The panel altogether ignored these submissions and articulated no rationale for its *sub silentio* rejection of the views of the two governments that co-chaired the negotiations that led to the Berlin Agreements and entered into the Executive Agreement and, with others, the Joint Statement. The panel's decisions thus fall well short of established norms of reasoned decisionmaking.

Unless corrected, the Ninth Circuit's assault on the internationally negotiated resolution of Holocaust-related issues will detrimentally interfere with German-U.S. relations and with the achievement of important German (and U.S. federal) foreign and domestic policy objectives. The Ninth Circuit's decisions sustaining the State of California's pursuit of its own "foreign policy" threaten a fundamental premise of the bilateral Agreement and German-U.S. foreign relations—that the Foundation should be the exclusive remedy and forum for addressing all claims asserted against German

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[15] The Eleventh Circuit struck down substantially identical legislation enacted in Florida. *See Gerling Global Reinsurance Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001).

companies arising from the National Socialist era and World War II, including claims regarding any remaining unpaid insurance policies. The Ninth Circuit's decisions also undermine the ability of the United States to help achieve "all-embracing and enduring legal peace" for German companies both in courts and before state and local regulatory bodies. The Ninth Circuit's errors in allowing California to interfere with the conduct of U.S. foreign policy, the operation of foreign commerce, and the regulation of insurance companies in Germany are important to both the United States and its allies, and should be corrected.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari to review the Ninth Circuit's decisions.

Respectfully submitted,

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In The
Supreme Court of the United States

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. – U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL INSURANCE COMPANY; GERLING AMERICAN INSURANCE COMPANY; AND CONSTITUTION INSURANCE COMPANY,

Petitioners,

vs.

HARRY W. LOW, in his capacity as the Commissioner of Insurance of the State of California,

Respondent.

AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, ET AL.,

Petitioners,

vs.

HARRY W. LOW, in his capacity as the Commissioner of Insurance of the State of California,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE BET TZEDEK LEGAL SERVICES IN SUPPORT OF THE OPPOSITION BY RESPONDENT HARRY W. LOW TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Bet Tzedek, "The House of Justice", is a non-profit, pro bono legal services agency that since 1974 has been providing free, high quality, compassionate legal representation to thousands of low-income residents throughout Southern California. Bet Tzedek provides these services to clients of all racial, religious and ethnic backgrounds and is perhaps the only organization in the United States regularly representing survivors of the Holocaust, completely free of charge, in their efforts to secure reparations for the horrors endured during the World War II era.

Over the past several years, Bet Tzedek has represented more than 1,000 Holocaust survivor clients, all of whom are elderly and poor. Each has been assisted in their efforts to assert claims under German-based reparations programs, United States-based litigation, and other humanitarian relief programs administered by various international funds or governments. With the assistance of more than 400 volunteer lawyers from throughout the greater Los Angeles community, Bet Tzedek's full-time staff is able to provide this unique assistance to this long-suffering community of clients, completely free of charge.

Bet Tzedek's experience has shown that those who are aged, infirm and low-income have the most difficult time

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[1] Pursuant to Supreme Court Rule 37.3(a), Bet Tzedek Legal Services has obtained consent from all parties to file this *amicus curiae* brief. Pursuant to Supreme Court Rule 37.6, Bet Tzedek Legal Services is the sole author of the entirety of this brief and no person, firm or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

accessing the judicial system. This is particularly true for those who may have language barriers, who come from other countries and cultures, and who, due to age and infirmity, are losing some of their mental sharpness. Into these categories fall thousands of Holocaust survivors. Bet Tzedek's Holocaust survivor clients average close to 80 years of age, and each is living below poverty-level standards.

Many of Bet Tzedek's clients have either made claims, or are contemplating the filing of claims, for payment of insurance benefits due under life and other insurance policies purchased by their families prior to the outbreak of World War II. The policies were purchased from, among others, the petitioner insurance companies or their affiliates. Due to the destructive actions of the Nazi regime, those who survived would not escape with possessions or copies of policies. Only the companies can now be expected to have those records. Accordingly, Bet Tzedek's clients have a substantial and material interest in this Court's determination of the issues presented.

Specifically, Bet Tzedek's clients are dependent on the reporting requirements of the statute here at issue, the Holocaust Victims Insurance Relief Act of 1999, California Insurance Code, sections 13800-13807 ("HVIRA"). HVIRA obligates insurers doing business in California to identify all insurance policies sold in Europe during the period 1920-1945 by themselves directly or by their European affiliates.

The statute requires disclosure of the names and last known addresses (or cities of domicile) of the policy holders and the current status of those policies. It is this disclosure provision that is of utmost importance to Bet

Tzedek and its clients. Without the ability to access *truthful* information that is exclusively and uniquely under the control of the petitioner insurance companies, Bet Tzedek's clients have never had, and will never have, the chance to assert claims for benefits their families intended them to have.

More importantly, however, the reporting requirements of HVIRA will finally give Bet Tzedek's aging and infirm clients the opportunity to learn their family histories and truths. Because of the advanced age, indigency and declining health of many of these clients, there is, realistically, only a slim chance that their fifty-year-old claims will yield monetary rewards during their lifetimes. The claimants are passing away and the likelihood they will die before these proceedings conclude is rapidly increasing. In addition, awards from such bodies as the International Commission on Holocaust Era Insurance Claims are slow in coming and meager in amount.

Consequently, rising in prominence in survivors' lives is the possibility of finally uncovering truths, finding peace in their histories and salvaging some measure of justice by securing information that has been so long withheld. Receipt of this information by survivors will be, by itself, the culmination of a lifetime of waiting – waiting for acknowledgment that they and their families were right in their quest for benefits and that their determined fight for justice may finally, at least in part, be realized. The benefits of this, alone, are immeasurable.

While some survivors may, as a result, ultimately end up receiving some small economic benefit to help ease the poverty of their final days, the most that many can hope for at this point is the salvation found in the discovery of

information that has been hidden from them for a lifetime. Because of the importance of this issue, Bet Tzedek and its clients have a deep interest in ensuring that all applicable legal and equitable considerations and arguments pertinent to these matters have been presented to the Court.

SUMMARY OF ARGUMENT

The further attempts by the petitioner insurance companies to prevent the implementation of HVIRA will have tragic consequences. The advanced age and infirm, impoverished condition of the vast majority of Bet Tzedek's Holocaust survivor clients is such that many will not survive the months it will take to complete the Court's review process. The plain and simple fact is that the longer implementation of HVIRA is delayed the fewer claimants the petitioners will ever have to deal with. The result will be that many will die never having had the chance to uncover or assert the rightful claims, or learn the truths, that their families bequeathed them.

As has been twice decided by the Ninth Circuit Court of Appeals, the petitioners are incorrect in asserting that HVIRA's straightforward reporting requirements run afoul of the foreign affairs powers of Congress or the due process clause of the Constitution. In assessing the thorough explication of these issues by the court below, equity demands that because further delay will be fatal to many long-suffering claimants, the well-reasoned opinions of the Ninth Circuit should stand and the current writ of certiorari should be denied.

ARGUMENT

I. INTRODUCTION

It is well established that in order to best protect its citizens, the State of California must have the authority to enact measures such as HVIRA. The clients of Bet Tzedek depend on the state's sovereign power to assert the rights of voiceless people so long ignored. In regulating the insurance industry operating within its borders, California is protecting the contractual rights of its own citizens in regard to businesses over which the state unquestionably exercises regulatory authority.

In seeking to exercise that authority, California has enacted a measure that conforms with public policy by assuring that insurance companies operating in the state do so in a responsible manner. The California legislature has determined that insurance companies doing business in California are fit to continue serving the people of the state *only* if full and truthful information is made available to the families of their policy-holders (or the policy-holders of their affiliates) who died in the Holocaust. The state's goal is to protect its citizens from companies that continue to withhold legitimately-needed policy information from aged, infirm survivors of one of history's great atrocities. By requiring the reporting of nothing more than truthful information, California is operating well within the bounds of the Constitution and is, in fact, promoting equity and justice.

II. EQUITY AND JUSTICE REQUIRE THAT THE WRIT OF CERTIORARI BE DENIED AND THAT ELDERLY HOLOCAUST SURVIVORS BE GIVEN THE CHANCE TO RECOVER TRUTHFUL INFORMATION AS SOON AS POSSIBLE

The delay engendered by a proposed granting of petitioners' writ of certiorari will have tragic consequences. Already, a number of Bet Tzedek's elderly, indigent Holocaust survivor clients have died without ever having had the opportunity to find out if their families' histories included an effort to care for them after their parents were brutally murdered for simply being Jewish. Unless HVIRA is enforced, the companies controlling the dissemination of this information will go unchecked, free to withhold information and policy benefits that rightfully belong to those who have already suffered. And the longer the companies are able to delay making these simple disclosures, the longer their actions remain unregulated, the more people will pass away while waiting for truths and acknowledgments that seemingly will never arrive.

Access to policy information may, hopefully, be of at least some economic benefit to a survivor in the long run, should he or she live long enough to pursue a valid claim. Easing the pain of poverty in one's final days is a benefit that should never be minimized. More likely, however, are the short-term non-economic benefits that will be foreclosed by a grant of a writ of certiorari.

Non-monetary benefits such as the search for family histories and truths, acknowledgment of past suffering and prior wrongs, personal satisfaction and dignity are not only legitimate, but crucial considerations in a court's assessment, if a court decides to engage in a balancing of relative hardships. *See, e.g., Chalk v. United States District Court*, 84

F.2d 701, 709 (9th Cir. 1988). For instance, a survivor may gain great personal satisfaction in being able to finally fulfill a promise to a parent to track down the parent's insurance policy should the survivor escape the Nazi death camps. This promise continues to haunt many survivors to this day. A survivor may experience joy in discovering a history that demonstrates a family member's efforts to provide for his or her future. Finally, recovering a piece of ones family history may restore to one a sense of dignity and peace, and perhaps be the first step towards some relief from the poverty that afflicts many a survivor's last days.

Additionally, further delay in enforcing the registry provisions of HVIRA, "even if only for a few months . . . represents precious, productive time irretrievably lost" to a survivor seeking information on her or his family's Holocaust-era insurance policy. *Chalk*, 840 F.2d at 710. Access to policy information may help an elderly survivor establish the validity of a claim, particularly a claim already submitted to, but not yet accepted by, the International Commission on Holocaust Era Insurance Claims ("ICHEIC") – the very body established by several of the very insurance companies now seeking this writ of certiorari.

HVIRA plainly does not regulate the payment of monetary claims nor does it require the payment of monetary claims. If, however, with the information garnered, the survivor is able to successfully pursue a claim, he or she may ultimately realize some economic benefit in the form of a monetary award or settlement. If he or she survives long enough to see the claims process through to its conclusion, the money may be used to relieve the suffering associated with age, infirmity and indigence. If, however, the writ is granted, many survivors will die during its pendency. Lost forever will be the chance to see any

benefit, monetary or not, from the release of truthful, accurate information, long withheld by the insurance companies, about the survivor's own past. "[I]t is not only the claims-handling practices of 50 years ago that are at issue, but also the current and continuing failure of California-licensed insurers and their foreign affiliates to disclose information about any outstanding potentially valid claims." *Gerling Global Reinsurance Corp. of America v. Low*, 296 F.3d 832, 847 (9th Cir. 2002).

Lopez v. Heckler, 713 F.2d 1432 (9th Cir. 1983) offers an ominous warning about the perilous condition of many Holocaust survivors residing in California. Although the present case does not involve the deprivation of government disability benefits dealt with in *Lopez*, the language about the effects of lengthy delays is instructive:

> [They] are largely infirm and disabled, their resources and life spans are by definition extremely limited. Deprivation of benefits pending trial might cause economic hardship, suffering, or even death. Retroactive restoration of benefits would be inadequate to remedy these hardship.
>
> . . .
>
> It is not only the harm to the individuals involved that we must consider in assessing the public interest. Our society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges. . . . It would be tragic, not only from the standpoint of the individuals involved but also from the standpoint of society, were poor, elderly, disabled people to be wrongfully deprived of essential benefits for any period of time.

Lopez, 713 F.2d at 1437.

III. WHEN WEIGHED AGAINST THE TRAGEDIES OF DELAY, THE WEAKNESS OF PETITIONERS' LEGAL ARGUMENTS DEMAND THAT THE PETITION FOR WRIT OF CERTIORARI BE DENIED

By further delaying the implementation of HVIRA, more and more indigent Holocaust survivors will pass away before ever having the chance to learn the truth about their families, much less assert reparations claims. When that urgency is balanced against the unlikely prospect of petitioners' success on the merits of their position, it becomes all the more apparent that the requested writ should be denied forthwith and that California should be permitted to assert its sovereign power to protect its citizens from unjust business practices.

A. HVIRA Does Not Violate the Due Process Rights of Petitioners

Under the California Administrative Procedures Act, all proceedings will be conducted in accord with recognized procedural safeguards, including hearings before an administrative law judge. Cal. Government Code sections 11370-11529. No remedies for violation of HVIRA will be meted out unless and until an allegedly offending insurance company has had the opportunity for a full and fair hearing under the well-established procedures of the California Administrative Procedures Act.

It should also be noted that it was within the clear contemplation of the contracting parties that enforcement of the subject insurance policies would likely occur in a foreign jurisdiction such as California. Many of the subject insurance policies issued by the petitioner insurance companies

expressly agreed to cover the insured worldwide (obviously encompassing enforcement in California). Some even had a clause permitting changes of residence and travel throughout the world, and all policies had implicit in their terms a promise to pay the policy benefits wherever the insured or his/her beneficiary resided at the time a claim was to be made. In such circumstances there can be no doubt that application of HVIRA to the petitioners, each doing business in California, is entirely fair and is wholly consistent with due process. *Clay v. Suns Ins. Office, Ltd.*, 377 U.S. 179 (1980).

The application of California law to the actions of businesses operating within its borders is eminently fair. The purpose of HVIRA is simply to set out reasonable conditions, protective of the interests of California residents, under which foreign-based insurance companies must produce information in order to lawfully continue to conduct business in California. *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981).

In the instant case, HVIRA does no more than regulate conduct taking place in the state, empowering California to legitimately exercise its authority over the companies in question. The companies' presence in California gives the state an interest in regulating the companies' insurance obligations to the extent that California residents are affected. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 317-318 (1981). Each of the involved companies is licensed and doing business in California, the class of people to be benefitted are California residents, the insurance contracts contemplated enforcement worldwide, and all licensing decisions are made with proper administrative hearings and procedural safeguards. With all these

factors in place, the ability of California to fashion reasonable remedial relief for its Holocaust survivor citizens is more than fair. If California is unable to act despite these protections, then the delays engendered by a granting of the petition for certiorari will simply lead to more tragedies.

B. Enforcement of HVIRA Does Not Interfere With the Foreign Affairs Powers of the United States

HVIRA regulates only private companies licensed to operate in California. It neither has an impact on, nor purports to have an impact on, any foreign government. Furthermore, despite the passage of HVIRA and the rulings of the Ninth Circuit upholding its terms, all international settlement processes continue to operate without interference. In fact, Bet Tzedek clients submitted claims to ICHEIC and to the German Foundation. These procedures are marching forward, unabated by the actions occurring in California. In truth, Bet Tzedek clients need the benefits of the HVIRA disclosure provisions in order to effectively participate in the ICHEIC claims process or otherwise assert rightful claims. Consequently, the enactment of HVIRA demonstrably has had no effect on the exercise of the United States' foreign affairs activities.

C. HVIRA Is Markedly Different in Substance from a Florida Statute and, Consequently, There Is no Conflict Among the Circuits

In Florida, a statute was passed which purported to exercise the authority to require European insurance

companies, even those not doing business in the state, to pay claims in a timely manner. In contrast, the Ninth Circuit has twice held that HVIRA is a reporting statute only, the aim of which is not to force the payment of claims, but simply to regulate the conduct of businesses licensed to operate in California. Consequently, the decision in *Gerling Global Reinsurance Corp. of America v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001) is not relevant here and there is no conflict between the circuits.

Because it is highly unlikely that HVIRA constitutes a deprivation of due process, interferes with foreign affairs, or would stand in conflict with other circuits, the legitimate interest of California in protecting its citizens stands paramount. The state has an overriding interest in protecting its citizens from companies whose out-of-state business practices call into question a company's integrity and fitness to serve the people of California. More specifically, with one of the largest populations of Holocaust survivors anywhere in the world, California has long demonstrated a deep interest in assuring that this unique community of citizens is treated fairly. Providing truthful information to people who have waited more than 50 years for nothing more than that is a legitimate, if not an overriding, state interest. It is an interest that far outweighs the dubious legal claims of companies whose goal seems to be keeping the truth away from those whose lives have been immeasurably affected by the withholding of simple facts.

IV. CONCLUSION

California has continued to be a national leader in exercising its sovereignty on behalf of the poor and powerless. HVIRA is an example of the way in which the people

of the state of California have established admirable public policy that seeks to assist thousands of citizens in their frustratingly long search for truth and justice. As Holocaust survivors near the end of their days, many are sick and many are poor. They share a common bond of tragedy and powerlessness. Today, California seeks merely to empower the most voiceless, giving them the chance to finally find truths and justice.

With all the protections afforded by the Constitution, California has balanced the needs of its most vulnerable and unique citizens with the respect due its business community. The result is HVIRA, a statute whose regulatory goal is the disclosure of truthful information. The measure protects the due process rights of the affected companies while effectively exercising the state's regulatory responsibilities. Consequently, the harm to a community of needy clients that will potentially result from a further delay in implementing HVIRA far outweighs any manufactured need to revisit the well-reasoned opinion from the court below.

On behalf of its elderly, indigent and long-suffering Holocaust survivor clients, *amicus curiae* Bet Tzedek, "The House of Justice", respectfully requests that the subject petition for writ of certiorari be denied.

Respectfuly submitted,

DAVID A. LASH

No. 02-733

Supreme Court, U.S.
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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Holocaust Victim Insurance Relief Act (the "HVIRA") – a California statute that imposes reporting requirements upon insurance companies doing business in California, and does not seek to influence, insult or comment upon any foreign government – is constitutional under the dormant foreign affairs power.

2. Whether the HVIRA, a reporting statute that does not regulate either foreign transactions or foreign insurance companies, exceeds California's legislative jurisdiction under the Due Process Clause.

3. Whether the HVIRA denies petitioners substantive due process because it does not permit as an excuse for noncompliance that the requested information is in the possession of a licensee's affiliate or that foreign law allegedly bars disclosure.

4. Whether the HVIRA denies petitioners procedural due process because, in the license suspension hearing for non-compliance to which petitioners are entitled, they are not permitted to assert the alleged "lack of control" and foreign law defenses that the legislature has determined are irrelevant.

LIST OF PARTIES

Respondent Harry W. Low is the Commissioner of Insurance for the State of California (the "Commissioner"). The Commissioner accepts the petitioners' "List of Parties and Rule 29.6 Statement."

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BRIEF IN OPPOSITION

Respondent Harry W. Low, in his capacity as the Commissioner of Insurance of the State of California (the "Commissioner"), respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by Gerling Global Reinsurance Corporation of America, *et al.* ("Gerling"), which is docketed as No. 02-733 (the "Gerling Petition"). The Commissioner also opposes the Petition for a Writ of Certiorari filed by the American Insurance Association, *et al.* ("AIA"), Assicurazioni Generali S.p.A. ("Generali"), and Winterthur International America Insurance Company, *et al.* (collectively, the "AIA Petitioners"), which involves the same decisions below and is docketed as No. 02-722 (the "AIA Petition").

In the consolidated proceedings below, Gerling and the AIA Petitioners brought identical challenges to a California statute, the Holocaust Victim Insurance Relief Act ("HVIRA"), California Insurance Code §§ 13800-13807. The Court of Appeals upheld the HVIRA against all their challenges. Now, Gerling and the AIA Petitioners bring separate petitions for a Writ of Certiorari, appealing between them five of the adverse rulings below.

Both Gerling and the AIA Petitioners appeal from rulings upholding the HVIRA against the claim that it invades the federal foreign affairs power and that it exceeds California's legislative jurisdiction under the Due Process Clause. Only Gerling appeals from rulings that the statute violates neither substantive nor procedural due process. Only the AIA Petitioners appeal from the ruling that the statute does not violate the dormant Commerce Clause.[1]

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[1] Although Gerling did not present the Commerce Clause question to this Court for review, it "join[s] in and fully adopt[s] the questions presented and arguments set forth in the [AIA Petition]." Gerling Petition at 3 fn.3. The Commissioner addresses the petitioners' appeal from the ruling upholding the HVIRA against their Commerce Clause challenges in his Brief in Opposition to the AIA Petition (No. 02-722) (pages 13-14, 22-30).

In this Brief, the Commissioner argues that neither the legislative jurisdiction claim nor either of the other due process claims merits a grant of certiorari. The Commissioner also argues in this Brief, in response to an argument made only by Gerling with respect to its foreign affairs claim, that the HVIRA does not interfere with U.S. obligations under the General Agreement of Trade in Services (GATS). In his Brief in Opposition to the AIA Petition, the Commissioner argues that neither the foreign affairs claim nor Commerce Clause claim merits a grant of certiorari.

For convenience, the Commissioner includes similar preliminary Statements in both Briefs. To avoid any additional duplication, the Brief in Opposition to the AIA Petition simply references the legislative jurisdiction argument the Commissioner makes in this Brief, and this Brief references the foreign affairs argument the Commissioner makes in his Brief in Opposition to the AIA Petition. The Commissioner has attached an identical Appendix to each Brief.[2]

OPINIONS BELOW

The Commissioner accepts the petitioners' statement of the "Opinions Below."

JURISDICTION

The Commissioner accepts the petitioners' statement of "Jurisdiction."

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[2] On November 22, 2002, the Commissioner filed with this Court an Application (No. A02-441) seeking permission to file a single brief, not to exceed 45 pages, together with a single appendix, in opposition to both petitions. On November 27, 2002, Justice O'Connor denied the Commissioner's Application.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

The dormant foreign affairs power, which is not found in any provision of the Constitution but which, in limited circumstances, has been implied from the nature of federalism.

The Due Process Clause, reproduced in the appendix attached to the AIA petition at 114a.

Federal Statute

The U.S. Holocaust Assets Commission Act of 1998, Pub. L. 105-186, 112 Stat. 611, as amended Pub. L. 106-155, § 2, 113 Stat. 1740 (1999) (codified at 22 U.S.C. § 1621 note (2000)), reproduced in the attached appendix at Resp. App. 4-16.

State Statute

The Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807 (2000), reproduced in the attached appendix at Resp. App. 17-22.

STATEMENT

For more than 55 years, Holocaust survivors have been stonewalled by insurance companies from which they have sought information. California is home to thousands of Holocaust survivors. ER 1699-1706.[3] These survivors are elderly and many live in poverty. App. at 23a;[4] ER 1699, 1700. Many are beneficiaries of insurance policies issued in Europe before World War II. ER 1700-1701; Resp. App. at

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[3] "ER" refers to the Excerpts of Record in the permanent injunction appeal.

[4] "App." refers to the Appendix to the AIA Petition.

23.[5] In most instances, the survivors and their families no longer have proof of that insurance, and the only remaining information is in the hands of insurers. Yet, many insurers have refused to make that information available, while at the same time denying numerous claims because the claimants cannot provide proof of insurance.[6] Some companies, recognizing their legal and moral responsibilities, have now provided this information.[7] Petitioners have not.

Instead, petitioners have attacked a California statute, the Holocaust Victim Insurance Relief Act ("HVIRA"), California Insurance Code §§ 13800-13807, which seeks some of the information that has been withheld. Relying on a rarely invoked and clearly inapplicable "foreign affairs" doctrine, petitioners have attempted to manufacture a foreign policy "crisis" that simply does not exist. They have

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[5] "Resp. App." refers to the Appendix attached to this Brief.

[6] The head of the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), former Secretary of State Lawrence Eagleburger, has publicly accused one of the ICHEIC members, Allianz, of failing to pay *any* of thousands of claims submitted to ICHEIC. ER 1958. In response, Allianz pointed out that 92% of the claims did not name any insurance company because survivors did not recall where their families had held the policies. ER 1958.

To the extent that petitioners suggest that needed insurance policy information is being provided through ICHEIC or a settlement with a German insurance foundation, that suggestion is, unfortunately, just wrong. Resp. App. at 25-27, 32-33; ER 544-552. For example, it appears that Allianz will *not* be required under the German Foundation Agreement to produce information about the more than one million policies it wrote. Resp. App. at 26. ICHEIC is a voluntary, private organization that includes only some European insurance companies. ER 544. A number of petitioners' affiliates here (*e.g.*, Gerling and members of the AIA such as Royal SunAlliance and CGU) have declined to join that organization. ER 544, 556.

[7] *See* Statement of David S. Waldman, Vice President and Chief Operations Counsel of MONY Life Insurance Company before House Sub-Committee on Government Efficiency, Financial Management and Inter-Governmental Relations, September 24, 2002. Resp. App. at 35-41.

also mischaracterized the HVIRA by asserting – contrary to the detailed findings of the Court of Appeals – that it requires the payment of claims and regulates both foreign companies and the substance of foreign transactions. It does nothing of the sort. Rather, the HVIRA "'is a California insurance regulation of California insurance companies' that 'requires California companies only to *provide information* about Holocaust-era insurance policies that they (or any of their affiliates) issued.'" App. at 9a (emphasis in original).

Applying this Court's well-known and long-standing precedent, the Court of Appeals has twice rejected the same arguments petitioners now advance in this Court. On both occasions, petitions for rehearing *en banc* were denied, with no judge requesting a vote on the petitions. App. at 3a-4a and Resp. App. at 42-43. Elderly Holocaust survivors and the State of California have already waited too long to obtain needed insurance information. Continued delay should not be permitted.

Before detailing the reasons why the petitions should be denied, the Commissioner will describe the statute at issue here and will address some of the more egregious misstatements in the petitions. *See* Supreme Court Rule 15.2.

A. The HVIRA And Its Purposes

The California legislature, based on uncontradicted findings of decades-long frustration of Holocaust survivors, unanimously passed the HVIRA. A reporting statute, the HVIRA seeks insurance policy information that will assist survivors in deciding whether and against whom they may have an insurance claim. Survivors may then decide whether they wish to pursue that claim, and if so, in what manner (*e.g.*, informally with the insurer, or through the ICHEIC, or through litigation).

The HVIRA imposes the obligation to obtain this policy information on insurers doing business in California if the insurer or a related company sold insurance policies in Europe during the Holocaust. The legislature expressly recognized the persistent and present refusal by insurance

companies to disclose needed information, and it determined that insurers doing business in California should take responsibility to obtain that information to avoid further victimization of survivors and their families. Cal. Ins. Code § 13801(a)-(e). Implicit in that determination is the legislature's conclusion that insurers who fail to comply are unfit to continue doing business in California. As the Court of Appeals concluded, the HVIRA reflects a number of state regulatory interests, including protecting California residents from insurance companies that refuse to provide critical information and/or refuse to pay valid insurance claims, and informing California residents about the character of the family of companies from which they might purchase insurance. App. at 16a, 22a, 23a, 25a. The Court of Appeals found that the HVIRA is rationally related to these legitimate government interests. App. at 22a-27a.

The HVIRA's approach – obtaining information from licensees about affiliate transactions elsewhere – is not materially different from long-standing statutes in every state that require insurance companies, banks and other regulated entities to provide disclosures about their own foreign transactions and those of their affiliates. All of the petitioners except Generali are members of insurance holding company systems[8] – multinational conglomerates whose members are linked together through various control relationships. ER 552-553. California, and virtually every other state,[9] understands and expects that membership in such holding company systems carries with it the obligation by licensees to report on the conduct of other members of that system. *See*, *e.g.*, Cal. Ins. Code §§ 1215-1215.16. Such membership may require cooperation by affiliates in

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[8] Generali is an Italian company that does business in California directly, and that issued Holocaust-era insurance itself. The HVIRA, of course, requires licensees such as Generali to report their own foreign transactions.

[9] *See Alleghany Corp. v. McCartney*, 896 F.2d 1138, 1140 (8th Cir. 1990).

reporting on foreign transactions. *See*, *e.g.*, Cal. Ins. Code § 1215.4(g).

Given that insurance and other industries are dominated by worldwide holding company systems, states must have the ability to obtain information about foreign transactions and foreign affiliates if they are effectively to carry out their regulatory function. App. at 25a-27a. Indeed, European insurance regulations also require the denial of a license where a prospective or actual licensee claims that foreign law prevents its disclosure of relevant information. European Parliament and Council Directive 95/26/EC, 1995 O.J. (L 168) 7. So too, if a company improperly fails to comply with the HVIRA's reporting requirement, the Commissioner must "suspend the certificate of authority to conduct insurance business in the state." Cal. Ins. Code § 13806.

The Commissioner has acknowledged that in any suspension proceeding, an insurer will receive a hearing under California's Administrative Procedure Act. *See* Cal. Gov't Code §§ 11370-11529 and App. at 29a. Under the HVIRA, the fact that information is in the hands of foreign affiliates or allegedly protected by foreign law are not valid defenses at such a hearing. As the Court of Appeals held, the California legislature rationally rejected those defenses. App. at 25a-27a. If a company's Holocaust-era records no longer exist or if the information is no longer in the possession, custody or control of the licensee or any of its related companies, on the other hand, then no disclosure is required and no suspension will occur. App. at 22a, n.1.

B. Petitioners Mischaracterize The HVIRA

Petitioners repeatedly mischaracterize the HVIRA, claiming that it "regulates" the substance of foreign insurance transactions, that it "regulates" foreign insurers, that it "encourages and facilitates drawn-out litigation" and that its "subject matter" is the "payment of claims." Gerling Petition at 2, 14, 19, 20 and "Question Presented" No. 1; AIA Petition at 15, 17 and "Question Presented" No. 2. The Court of Appeals has twice ruled, however, that such

contentions "mischaracterize HVIRA as a matter of law." App. at 9a, 43a. Instead, the HVIRA is simply a reporting statute that "seeks only to obtain information about conduct in another jurisdiction without affecting directly any of the conduct." *Id.* As the Court of Appeals concluded:

> HVIRA's reporting provisions do not seek to regulate the substance of out-of-state transactions. The statute does not require insurers to pay any claims or otherwise alter the terms of Holocaust-era insurance policies. To the contrary, HVIRA requires California insurers *only to disclose information about* their foreign transactions or those of their affiliates. A request for information is simply not equivalent to a direct regulation of out-of-state transactions.

App. at 15a-16a (emphasis in original). *See also* App. at 43a.

Petitioners similarly attempt to characterize the HVIRA as an "extraterritorial" regulation. AIA Petition at 24-26, 28. The Court of Appeals also rejected that argument:

> HVIRA's reporting requirements might force a "related" company of a California business to search for information, but that is the extent of HVIRA's "extraterritorial" reach. HVIRA, on its face, does not regulate foreign insurance policies, or control the substantive conduct of a foreign insurer, or otherwise affect "the business of insurance" in any other country. . . .

App. at 44a.

Petitioners support their mischaracterizations by complaining that the HVIRA makes them pay twice for Holocaust-era claims. AIA Petition at 4, 13.[10] But the HVIRA does not compel any such thing. It does not demand, require or force the payment of any claims, and it makes no

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[10] Holocaust survivors would be grateful if these companies paid just once.

judgment as to whether policies have been properly paid. Nor does it encourage private litigation in California or elsewhere. Quite the contrary, as ICHEIC Chairman Eagleburger and others have recognized, the disclosure of insurance policy information is essential to *any* resolution of Holocaust-era insurance claims, including resolution through ICHEIC. ER 1955.

Petitioners also improperly resort to extensive citation and discussion of another California statute, Code of Civil Procedure Section 354.5, that was enacted a year earlier than the HVIRA. AIA Petition at 7, 8, 23, 115a-122a; Gerling Petition at 1, 3, 4, 5, 14, 20. Section 354.5 provides a California venue for claims made against insurers doing business in the state or whose contacts would already subject them to jurisdiction here, and it extends the statute of limitations on those claims to 2010. The statute does *not* confer personal jurisdiction over foreign affiliates and does *not* impose liability on the local licensee under policies issued by a foreign affiliate.

Petitioners present this separate and distinct statute as though it were part of the HVIRA. But both the District Court and the Court of Appeals rejected identical attempts to conflate the HVIRA with the other statute. App. at 6a, 7a, 10a, 16a, 17a, 38a 43a, 86a, 87a. The District Court dismissed all petitioners' challenges to Code of Civil Procedure Section 354.5 for lack of standing, petitioners never appealed that ruling, and both the District Court and Court of Appeals expressly declined petitioners' invitation to link that statute with the HVIRA. *Id.* The District Court, noting that petitioners were referring to both statutes as the "HVIRA," pointed out that Code of Civil Procedure Section 354.5 had been enacted *before* the HVIRA and was "*not* part of the HVIRA." App. at 86a, n.1 (emphasis added). Indeed, petitioner Generali itself has argued in unrelated litigation concerning payment of Holocaust-era insurance claims that the HVIRA "is a separate enactment from [Code of Civil Procedure Section 354.5]" that "[does] not apply California law to foreign insurance contracts, but merely [seeks] information about such policies." Resp. App. at 71.

In short, the HVIRA does not regulate either foreign transactions or foreign companies. Instead, as the Court of Appeals found: "HVIRA is a California insurance regulation of California insurance companies that affects foreign commerce only indirectly." *Id.* at 45a.

C. Petitioners Attempt To Manufacture A Foreign Policy "Crisis" When None Exists

No international Holocaust initiative has been prevented or delayed by the HVIRA. None of the petitioners other than Generali is a European company (Generali is an Italian company licensed to do business in California). Many of petitioners' affiliates are not German companies. Many are not members of ICHEIC.[11] However, relying primarily on earlier suggestions from the Executive Branch and Germany that the HVIRA might "complicate" a then-unfinished agreement with German companies or might undermine ICHEIC, petitioners seek to create the spectre of a foreign policy "crisis," when in fact none exists. AIA Petition at 2-9, 12-14; Gerling Petition at 5-9. Quite the contrary, the German Foundation Agreement has been consummated and funded, and ICHEIC continues to function as it always has, unaffected by the HVIRA.

In 1999, Germany and several German companies announced their intent to establish a foundation primarily to compensate forced laborers and others who suffered at the hands of German companies during the Nazi era. App. at 51a, 129a. Soon thereafter, the Foundation "Remembrance, Responsibility and the Future" was established. The Foundation is to pay claims that have been or may be asserted against German companies arising from the Nazi era, and is to be funded by German companies and the German government. App. at 51a, 129a, 153a-168a.

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[11] The United States did not create ICHEIC, and the Government's role in ICHEIC is only as an observer. ER 544.

In July 2000, Germany and the United States entered into an Executive Agreement regarding the Foundation. App. at 51a, 129a, 153a-168a. That agreement is not a treaty, is not even a "government-to-government claims settlement agreement," and does not preempt the HVIRA. Resp. App. at 45, 48-49. Instead, that agreement simply recognizes that German companies desire "legal peace," and the United States agreed that in any case filed in a court in this country *against* a German company arising from the Holocaust-era, the United States will "inform its courts . . . that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims." App. at 156a.

But the United States has already advised the Court of Appeals in this case that, contrary to petitioners' assertions, the government "has not . . . undertaken a 'duty . . . to achieve' legal peace for German companies against state litigation and regulatory action." Resp. App. at 47-48.[12] The United States has similarly explained that the agreement's contemplation of "legal peace" relates to "claims *against* German companies that arise out of the Nazi era," that the HVIRA does not contravene specific provisions of the Executive Agreement, and that this case (which does not involve claims against *any* insurance company) "is not one that implicates the German obligation to make payments from the Foundation." Resp. App. at 51-52 n.7 (emphasis in original).

Nor has the HVIRA precluded the consummation or implementation of the Executive Agreement. As the United States also informed the Court of Appeals in this case:

> [Petitioners] are wrong to represent that the panel's decision has placed 'major international

[12] The agreement recognizes that the United States' interests concerning the Foundation do not "in themselves provide an independent basis for dismissal," of lawsuits against German companies. Resp. App. at 45-46. The United States has since acknowledged that the agreement does not have any preemptive effect. Resp. App. at 48-49.

> agreements . . . in jeopardy' and that Holocaust survivors 'will get no relief from the German Foundation so long as the panel's decision remains in effect.' Under German law, the contribution of German companies to the Foundation, and payments to victims, depend upon a determination by the German Parliament that 'adequate legal security' exists.

Resp. App. at 51 n.7. On May 30, 2001 (after the Court of Appeals' first decision in this case), the German Bundestag determined that adequate "legal peace" exists, and authorized the Foundation to make funds available for the payment of claims. Resp. App. at 53-54. On October 16, 2002 (after the Court of Appeals' second decision in this case), German insurance companies, which continue to refuse to be bound by ICHEIC's claims procedures, reached agreement with ICHEIC to coordinate their claims handling and other procedures with that organization. *See* "Lodging", submitted in support of the Gerling Petition, at L-70 to L-180.

There is simply no evidence that the HVIRA impairs the effective exercise of the Nation's foreign policy. App. at 45a-53a. Quite the opposite, the Court of Appeals concluded that through the U.S. Holocaust Assets Commission Act of 1998 (Resp. App. at 4-16), "Congress has spoken affirmatively in the area of Holocaust-era insurance policies and has acquiesced in state laws like HVIRA." App. at 47a. Among other things, that Act directs a commission to study and develop a record of Holocaust-era insurance policies, and instructs the commission to enlist the aid of, and coordinate with, state insurance regulators in that endeavor. App. at 47a-50a. Based on the "text, context, and history" of the Act, the Court of Appeals determined that "Congress was aware of the states' involvement in this area and, at least implicitly, encouraged laws like HVIRA." App. at 50a.

D. European Data Protection Laws

Petitioners contend that disclosure of the information sought by the HVIRA would violate certain European data

protection laws and subject foreign companies to civil and criminal penalties. AIA Petition at 11, 29; Gerling Petition at 2, 10, 11, 19. As discussed below, the fact that disclosure might violate foreign law does not make the HVIRA unconstitutional.

But even if foreign law were a relevant consideration, petitioners have grossly overstated its application here. The German data protection law is the only law on which petitioners seriously rely. Most of the petitioners, however, are not German companies. One of the petitioners, Generali, is an Italian company, and it makes no claim that Italian law precludes disclosure.

Whether compliance with the HVIRA would violate German law is hotly disputed. The Commissioner has submitted declarations from two experts, including the former head of Germany's Federal Data Protection Commission, both of whom conclude that disclosure of the decades-old information sought is permissible under German law. ER 1708-1768, 1914-1929. The German government has said only that unauthorized disclosure of private data "*may* result in civil and criminal penalties" (Resp. App. at 5-7) (emphasis added), and there is no evidence in the record that any foreign government has taken or would take steps to prosecute petitioners or their affiliates if they provided the information required by the HVIRA. There is also no evidence that petitioners have even made a good faith effort to obtain that information.[13]

SUMMARY OF ARGUMENT

This case does not warrant review, and the petition should be denied. Petitioners grossly overstate the case's potential impact on foreign affairs, and do not show a conflict with any decision of this Court or any federal court of appeals.

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[13] The Court of Appeals did not reach these issues, since it ruled that in any event due process was not implicated. App. at 20a-29a.

A. Foreign Affairs

The Commissioner summarizes and fully discusses the reasons why the HVIRA does not interfere with U.S. foreign affairs in his Brief in Opposition to the AIA Petition (No. 02-722) (pages 13, 15-21). Furthermore, the General Agreement on Trade in Services (GATS), an international agreement that is expressly not preemptive of state law and does not conflict with the HVIRA, provides no basis for invalidating the HVIRA either. *See* 19 U.S.C. § 3512(b)(2)(A) (2000). The GATS issue is fully discussed below (pages 17-18).

B. Legislative Jurisdiction

The HVIRA does not exceed California's legislative jurisdiction. The statute is a state regulation of in-state insurance companies. Its only requirement with respect to European insurance policies is that California companies report information concerning Holocaust-era policies that they or their affiliates issued. The statute does not regulate payment of claims, and does not regulate those policies in any other way.

Because the HVIRA does not regulate the substance of out-of-state policies, those policies need not have minimum contacts with California. As the Court of Appeals has ruled, no decision of this Court holds that the minimum contacts test for legislative jurisdiction limits a state's power to require reporting on out-of-state matters by companies that do business in the state. A contrary rule not only would cripple important governmental regulatory power, but also would jeopardize regulatory regimes already in existence and be inconsistent with judicial decisions upholding those regimes against constitutional attack.

The HVIRA is also constitutional even if the minimum contacts test applies. The minimum contacts test assesses the legitimacy of the regulating state's interest. California has a legitimate interest in assuring that its resident Holocaust survivors are supplied sufficient information to determine whether they have possible Holocaust-era insurance claims – wherever and whenever they may be

able to pursue such claims. In addition, the fact that petitioners do business in California independently supplies a sufficient contact to justify the HVIRA's reporting requirement. The state has an interest in protecting Californians from insurance companies with a history of questionable business practices, and in providing California consumers with information about the family of insurance companies from which they may contemplate buying insurance.

Finally, the decision below does not conflict with the Eleventh Circuit's decision in *Gerling Global Reinsurance Corp. of America v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001). *Gallagher* concerned a materially different statute and materially different facts, and any perceived difference in the legal analyses of the Ninth and Eleventh Circuits would not affect the outcome of this case. Specifically, the Eleventh Circuit found that Florida's only purpose in passing its statute was to force payment of claims on European policies; the Florida provision was embedded within a statute that also authorized recovery on claims (including treble damages), and Florida had attempted to enforce its law against European insurers that did not do business in Florida. In contrast, the Ninth Circuit found that the HVIRA was merely a reporting statute that did not force payment of claims, was not enforced against European insurers that did not do business in the state, and was supported by legitimate state regulatory purposes.

C. Substantive Due Process: Petitioners' "Excuse" Defenses

Whether the Constitution requires that foreign law or alleged lack of control be permitted as defenses raises a substantive, not procedural, due process issue. Since the HVIRA neither employs a suspect classification nor infringes a fundamental right, the standard of review is the rational basis test. As the Court of Appeals found (App. at 22a-27a), the HVIRA easily passes that test.

Because noncompliance with the HVIRA's disclosure requirements would interfere with legitimate state regulatory interests, it is not irrational (or unfair) for the

legislature to have precluded these defenses. Contrary foreign law or uncooperative foreign affiliates cannot provide a constitutional barrier to the enforcement of a state's reasonable business regulation. No court has ever held that the authority to grant or withhold a business license is subject to these limitations.

D. Procedural Due Process

California law fully protects petitioners' procedural due process rights. While the HVIRA is silent as to what procedures are required in a license suspension proceeding, the California Administrative Procedure Act requires the provision of such procedures as are required by the federal or state Constitutions. Petitioners are entitled to a hearing on any facts the HVIRA makes relevant to a license suspension. That is all the process that is due.

Petitioners' alleged foreign law and lack of control defenses are not permitted under the terms of the HVIRA. Unless the HVIRA is substantively unconstitutional for failing to permit these defenses, petitioners do not have a right to a hearing with respect to such defenses.

REASONS TO DENY THE PETITION

I. THE COURT OF APPEALS' DECISIONS UPHOLDING THE HVIRA HAVE NOT HAD, AND ARE NOT LIKELY TO HAVE, ADVERSE EFFECTS ON U.S. FOREIGN POLICY, AND DO NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER FEDERAL COURT

Gerling repeats, but does not materially add to, the arguments relating to U.S. foreign affairs contained in the AIA Petition (No. 02-722). In his Brief in Opposition to the AIA Petition, the Commissioner argues that the Court of Appeals' decisions upholding the HVIRA have not had, and are not likely to have adverse effects on U.S. foreign policy, and do not conflict with any decisions of this Court or any other federal court. The Commissioner respectfully requests

the Court to refer to his Brief in Opposition to the AIA Petition (pages 15-21) for full discussion of these foreign affairs issues.

Gerling also argues that the HVIRA is invalid because it conflicts with the United States' international obligations under the General Agreement on Trade in Services (GATS). Gerling Petition at 28-29. This argument was not raised by Gerling or any other party or amicus, nor considered by any court, at any prior stage of this litigation – and with good reason. First, the federal law implementing GATS and related agreements, the Uruguay Round Agreements Act, 19 U.S.C. § 3512(b)(2)(A) (2000), specifically states:

> No state law, or the application of such state law, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law or application invalid.

And to be doubly sure, Section 3512(c)(1) reiterates that "[n]o person other than the United States . . . may challenge, in any action brought under any provision of law, any action or inaction by . . . any state or any political subdivision of a state on the ground that such action or inaction is inconsistent with such an agreement." *See also* 19 U.S.C. §§ 3501(2)(7), 3511(d)(14) (defining "Uruguay Round Agreements" to include GATS). These provisions specifically include within their protection "any State law regulating or taxing the business of insurance." *Id.* § 3512.

In any event, the HVIRA is not inconsistent with GATS, and Gerling cites no authority at all in support of its argument. As Gerling acknowledges, the principal effect of GATS is to establish "most favored nation" treatment to its signatories – that is, that countries will not discriminate among the products and services of different countries. The HVIRA does not discriminate: It applies to *all* insurance companies doing business in California, of whatever nation (including the United States), that issued policies in Europe

during the relevant period. Gerling has no credible claim to a GATS violation.

II. THE COURT OF APPEALS' DECISION UPHOLDING THE HVIRA AGAINST A DUE PROCESS/LEGISLATIVE JURISDICTION CHALLENGE DOES NOT WARRANT FURTHER REVIEW BY THIS COURT

Petitioners argue that the Court of Appeals' decision in *Gerling II* (App. 1a-33a) conflicts with decisions of this Court and other Courts of Appeal which hold that the Due Process Clause limits state legislative jurisdiction to the regulation of activities that have minimum contacts with the state.[14] There is no conflict, however. The court below correctly held that the HVIRA is a reporting statute that only seeks information about business practices of companies doing business in California and their affiliates. Despite petitioners' repeated assertions to the contrary, the HVIRA does not attempt in any way to regulate claims payment practices (or other business activities) of foreign insurers. No decision of this Court has held that a state may not seek information about out-of-state business practices in aid of its business licensing procedures. As the court below observed, to hold otherwise would critically limit a state's ability to investigate the suitability of foreign and related companies to do business within the state. App. at 19a-20a.

Nor does the decision of the Eleventh Circuit in *Gallagher*, upon which petitioners substantially rely, create any tension with this case worthy of this Court's consideration.

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[14] Gerling and the AIA Petitioners both claim, in essentially identical terms, that the HVIRA exceeds California's legislative jurisdiction under the Due Process Clause. The Commissioner's arguments in Section II of this Brief are equally responsive to the legislative jurisdiction claims raised in the AIA Petition (No. 02-722).

Indeed, petitioner Generali has argued in unrelated litigation concerning the payment of Holocaust-era insurance claims that *Gallagher* has "no application" here, where only "reporting provisions" are at issue, because Florida's statute, "unlike the HVIRA, ... contained provisions that directly sought to regulate foreign transactions." Resp. App. at 71-72. As explained below, *Gallagher* concerned a materially different statute and is not inconsistent with the Court of Appeals' decision in this case.

A. The Decision Below Is Consistent With This Court's Legislative Jurisdiction Decisions, Which Do Not Involve Requests For Information

Petitioners rely on decisions of this Court which hold that as a matter of due process, a forum state may not, in private litigation, apply its substantive law to an out-of-state transaction unless the transaction has "minimum contacts" with the state. *See, e.g., Home Ins. Co. v. Dick,* 281 U.S. 397 (1930). The Court of Appeals here correctly concluded that these decisions involved due process limits on a state's attempt to regulate "the substance of out-of-state transactions." App. at 13a-16a. In *Home Insurance,* for example, what this Court found constitutionally objectionable was Texas' "attempt to impose a greater obligation than that agreed upon," and this Court held that "Texas was therefore without power to affect the terms of the contracts so made." 281 U.S. at 408.

In contrast, the decision below properly held that the HVIRA's reporting requirement, unlike the forum state laws in the legislative jurisdiction decisions, does not regulate the substance of out-of-state transactions because it "does not require insurers to pay any claims or otherwise alter the terms of Holocaust-era insurance policies." App. 15a-16a. States routinely require companies to disclose information about out-of-state and foreign transactions as a condition of doing business in the state, and no decision has suggested that such reporting statutes must pass a "minimum contacts" test.

As they did in the Court of Appeals, petitioners attempt to avoid this conclusion by arguing that the HVIRA's only purpose is to force payment on European insurance policies, and thus effect a substantive regulation of those policies. AIA Petition at 22; Gerling Petition at 18. But the Court of Appeals rejected this characterization of the HVIRA, and there is no reason to revisit that decision. As the Court of Appeals held, (1) facially the HVIRA is a reporting statute that applies only to companies doing business in California, and is not an extraterritorial regulation; (2) the HVIRA serves important territorial purposes, including the traditional regulatory purpose of assuring insurer fitness to conduct business within the state, as well as providing information to Californians both about potentially valid insurance claims they might have and about the character of the family of insurance companies from whom they might buy insurance; and (3) other and separately enacted California statutes that might relate to claims payment of Holocaust-era policies are not an issue in the present case. App. at 15a-17a, 22a-23a.

B. Petitioners Argue For An Undue Extension Of The Legislative Jurisdiction Doctrine That Would Cripple State Regulatory Power

No authority supports petitioners' attempt to use the legislative jurisdiction doctrine to deprive states from obtaining information from state-licensed companies about out-of-state transactions. Any such holding would devastate a state's ability to regulate companies doing business within its borders. As the Court of Appeals observed, "states would be prohibited from requesting information about potentially fraudulent conduct committed by a local company's European parent simply because the 'subject matter' of that conduct was a foreign transaction among foreign nationals." App. at 20a. As the Court of Appeals further observed, state regulatory authorities routinely require disclosure of information about out-of-state transactions as a condition of doing business within the state, particularly as they relate

to the business conduct of a company's foreign affiliates, and no court has ever doubted their right to do so. *Id.*

Yet, petitioners' view of legislative jurisdiction would invalidate many of these existing reporting statutes. This kind of restriction on state (and, by virtue of the Fifth Amendment's Due Process Clause, presumably federal) regulatory authority would substantially interfere with important regulatory interests, particularly as applied to financial institutions. The conduct of the parent and each of the subsidiaries of a financial institution under common influence or control is obviously relevant to the fitness and integrity of the family of companies, whether or not the conduct at issue occurred within the regulating state.

C. The HVIRA Is Constitutional Even If The Minimum Contacts Test Applies

Even if the HVIRA is subject to the minimum contacts test, there is no doubt that such minimum contacts exist, and no cases suggest otherwise. As the Court of Appeals held, the HVIRA "does nothing more than seek information from California-licensed insurers." App. at 20a. All of the companies regulated by the HVIRA do business in California. As the Court of Appeals explained, California has important reasons to ask these companies to disclose information about their affiliates' claims-handling practices as a condition of doing business in the state. App. at 16a, 22a-23a. The HVIRA is not a substantive regulation of out-of-state policies or out-of-state companies.

To the extent California must demonstrate "minimum contacts" with the information it seeks, California has at least two contacts that easily satisfy the test. First, perhaps as many as 22,000 Holocaust survivors currently live in California, many in poverty. ER 1699-1706. Information supplied pursuant to the HVIRA may help some of them pursue valid insurance claims, easing the burden on the state's fisc. App. at 23a, n.12. Second, all of the insurers regulated by the HVIRA currently do business in California. For this reason, the State has regulatory interests in assuring their fitness to sell insurance and in protecting

California insurance consumers, both of which are interests furthered by the HVIRA. App. at 16a, 23a. Together, these contacts are more than adequate to meet what this Court has described as the "modest restrictions" of the minimum contacts test. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985).

Citing *Shutts,* petitioners argue that the presence of thousands of Holocaust survivors in California is irrelevant for due process purposes because a plaintiff's "post-transaction change of residence" is not sufficient to warrant application of forum state law. AIA Petition at 21. But this Court made clear that its concern in *Shutts* was preventing forum shopping, a concern not relevant to the HVIRA. Thus, this Court in *Shutts,* discussing *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), in which the plurality held a plaintiff's forum state residence to be a relevant contact, explained that the change of residence was "relevant because it was unrelated and prior to the litigation." 472 U.S. at 820. Likewise, Holocaust survivors moved to California decades before the enactment of the HVIRA, and their residence in the state is unrelated to forum shopping.

In addition, all of the insurers to which the HVIRA applies do business in California, which, as the Ninth Circuit held, generates several California regulatory interests. App. at 16a, 22a, 23a, 25a. Information relevant to out-of-state claims-processing practices of in-state insurers' affiliate companies bears upon the regulated in-state insurers' fitness to do business in California in at least two ways. First, questionable claims practices of related companies may suggest unreliability of the family of insurers, including the California company. Second, as stated on the face of the HVIRA, Cal. Ins. Code § 13802(c), (e), insurers are often the only source of information about Holocaust-era policies. In this circumstance, a foreign insurers' current refusal to cooperate in supplying information reflects on the fitness of its California affiliate. California also "has a legitimate interest in providing information to its citizens about the character of the family of insurance companies from which they are contemplating buying insurance." App. at 23a.

D. The Decision Below Does Not Conflict With The Eleventh Circuit's Decision In *Gallagher* On A Matter Material To The Outcome Of This Case, Nor Does *Gallagher* Provide Any Reason To Grant Certiorari

Petitioners rely heavily on the decision of the Eleventh Circuit in *Gallagher*, 267 F.3d 1228 (11th Cir. 2001), which invalidated a Florida statute relating to Holocaust-era insurance policies. While the Ninth Circuit acknowledged some unspecified disagreement with some of the discussion in *Gallagher*, the *Gallagher* decision was based on materially different facts, and any perceived tension in the legal analyses of the Ninth and Eleventh Circuits would not affect the outcome in this case. Accordingly, *Gallagher* is not a reason to grant certiorari here.

In *Gallagher*, the Eleventh Circuit found the Florida statute to be an unconstitutional attempt by that state to reach beyond its legislative jurisdiction to regulate substantively European insurance companies with no connection to Florida. In contrast, the court below found that the HVIRA reasonably requires California-licensed companies to provide information for purposes in which the state has a legitimate interest. Thus, the two outcomes resulted not from material conflicts in the courts' views of the law, but because, as the court below noted, the Florida statute is "materially distinguishable" from the California statute on several critical factual points. App. at 9a.

First, Florida attempted to enforce its law against European insurers that did not do business in Florida, whereas California's law is addressed only to California-licensed companies. In *Gallagher*, Florida's insurance commissioner had issued subpoenas directing the disclosure of documentation relating to Holocaust-era policies. The subpoenas, although nominally directed to Florida companies, by their terms defined Florida companies as *including* foreign affiliates and accordingly commanded *both* the Florida-licensed companies and their foreign affiliates to

produce the records they sought. *Gallagher*, 267 F.3d at 1231.[15] In contrast, this case does not involve the exercise of a state's subpoena power, nor any other attempt to enforce state law against foreign entities. Like countless other state regulatory measures, the HVIRA merely provides that if companies doing business in California wish to maintain their state-issued business licenses, they must provide certain information to state regulators. While petitioners dispute the Ninth Circuit's view of the facts, they do not explain how this factual difference creates any conflict between the Circuits on a matter of law.[16]

Second, the Florida law in *Gallagher* stated that its purpose was to compel European insurers to pay Holocaust-era insurance claims, and to that end required the provision of policy information and created private rights of action against Florida-licensed insurers if they did not pay claims on those foreign policies issued by their affiliates. The statute authorized recovery of treble damages, attorney's fees and costs, and mandated that insurers permit relaxed standards of proof by claimants. *See* Fla. Stat. § 626.9543(5), (10).[17] In contrast, as the court below held, the HVIRA is only a reporting statute requiring that information about Holocaust-era insurance policies be disclosed as a condition of obtaining or retaining a license to do business in the State. App. at 9a, 15a, 16a.

Third, the California and Florida statutes are supported by materially different state interests. The Eleventh

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[15] A copy of one of the several identical subpoenas that were served in *Gallagher* is found at Resp. App. 58-66.

[16] For example, Gerling mistakenly claims, on the basis of elaborate citations to the record, that in various particular instances, some California officials attempted to enforce the HVIRA against European companies. Gerling Petition at 16-17. The Court of Appeals properly rejected petitioners' characterization of these alleged facts (App. at 13a, n.5), and in any event, there is no need for this Court to revisit the Court of Appeals' view of the factual record.

[17] A copy of the Florida statute is found at Resp. App. 67-70.

Circuit found that the Florida statute's express and sole purpose was forcing the payment of claims and held that Florida lacked legislative jurisdiction to pursue this objective. *Gallagher*, 267 F.3d at 1229, 1238. As the court concluded, the Florida statute's reporting provisions, under which the subpoenas were issued, "pertain to, and as a practical matter unquestionably seek to regulate, a subject matter – the German affiliates' payment or non-payment of Holocaust-era policy claims – with no jurisdictionally significant relationship to Florida." *Id.*[18]

In finding only a claims-paying purpose and not a regulatory purpose, the Eleventh Circuit also thought it significant that the claims-recovery provisions were in the same statute as the reporting provisions. *Id.* Indeed, the Eleventh Circuit was careful to state that its decision was a limited one based on the facts before it. *Id.* at 1229, 1239. Even more significantly, the Eleventh Circuit also recognized that the reach of Florida's legislative jurisdiction might well extend to investigations into, and obtaining records about, the practices and affairs of the foreign affiliates of Florida companies. *Id.* at 1239. However, on the record before it, no such interests had been identified. *Id.*

The HVIRA is significantly different. As the court below held, the HVIRA is a regulation of California insurance companies that does not compel the payment of any claim or otherwise regulate any foreign transaction. App. at

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[18] The attention given by the Eleventh Circuit to the perceived claims-paying "actual purpose" of the Florida statute may have been a function of that court's belief that the Florida commissioner had conceded that there was no other purpose. *Gallagher*, 267 F.3d at 1238, 1239 & n.7. The Court rejected as a post-hoc "litigating position" the Florida Commissioner's untimely assertion that the statute also had the regulatory purpose of confirming the claims payment practices, solvency and good character of the Florida insurers. *Id.* at 1240. That argument, according to the Eleventh Circuit, had not even been raised by the Commissioner in the district court and conflicted with the Florida legislature's "own unequivocal statement of [the statute's] purpose." *Id.* at 1239.

9a, 15a, 16a ("HVIRA's reporting requirements do not seek to regulate the substance of out-of-state transactions."). Moreover, the Commissioner (unlike Florida's insurance commissioner) has consistently argued that the HVIRA serves important regulatory purposes within the state, and the court below agreed. *Id.* Again, petitioners dispute the Court of Appeals' interpretation of the facts, but do not show that it misapplied the law. In particular, petitioners quarrel with the Court of Appeals' view of the purposes of the HVIRA. But this dispute does not amount to a conflict with the Eleventh Circuit, which reached its conclusion with regard to a different statute on a different factual record.

In sum, the Florida statute in *Gallagher* and the HVIRA are materially different laws with materially different purposes, objects and effects. Specifically, the Eleventh Circuit found, on the basis of the purpose, statutory context and enforcement procedures, that the Florida statute sought to regulate the substance of out-of-state transactions, a goal limited by the legislative jurisdiction doctrine. In contrast, the Ninth Circuit specifically found, on the basis of the purpose, statutory context and enforcement procedures of the HVIRA, that it did *not* regulate the substance of out-of-state transactions, and thus did *not* implicate the legislative jurisdiction doctrine. This, rather than any tension in the legal analyses of the two Courts of Appeals, accounts for the difference in outcomes.[19]

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[19] After listing the factual differences between the California and Florida statutes as a reason for distinguishing *Gallagher*, App. at 9a-11a, the Ninth Circuit stated without elaboration, as a second reason for declining to adopt the Eleventh Circuit's reasoning, that *Gallagher* "offers an interpretation of the legislative jurisdiction doctrine that conflicts with the relevant precedents, at least insofar as a statute like HVIRA is concerned." *Id.* at 11a. The Circuits agreed that a state law would be subject to the legislative jurisdiction doctrine if it regulated the substance of a foreign transaction, *see* App. at 11a, but on the facts of the particular cases the Eleventh Circuit held that Florida's statute regulated the substance of foreign transactions while the Ninth Circuit

(Continued on following page)

III. THE HVIRA DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS, EVEN IF THE STATUTE REQUIRES PETITIONERS TO PRODUCE DOCUMENTS IN THE HANDS OF AFFILIATES OR IN VIOLATION OF FOREIGN LAW

The Gerling petitioners further argue that, as applied to them, the HVIRA violates due process because it requires them to produce documents that are in the hands of affiliates or whose production would violate foreign law. Gerling Petition at 22-23. The Court of Appeals rightly rejected this argument as imposing extraordinary and unprecedented restrictions upon state licensing regulations.

In exercising its power to regulate its insurance market, California (like other states) routinely requests disclosure from licensees of financial and other information which may be located in foreign nations or in the hands of affiliates. App. at 20a, n.10 (citing statutes). If a licensee is unable or unwilling to produce this information, the natural consequence is that a business license is suspended or not granted, not that the licensee is excused from the requirement. There is nothing "unfair" about this result: The point of imposing conditions upon the grant or maintenance of a license is that those persons unable to comply with the conditions cannot obtain or keep the license.

Whether Gerling has "control" of the information sought and whether foreign law bars disclosure is disputed. But even assuming that the California licensees do not have control of information in the hands of their foreign parents and affiliates and that disclosure pursuant to the HVIRA would violate European data protection laws, license suspension is constitutionally permissible so long as

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held that the HVIRA did not. This does not suggest that the Eleventh Circuit's legal analysis "conflicts" with the Ninth Circuit's legal analysis, but rather suggests that the Eleventh Circuit's analysis was not applicable to the Ninth Circuit case because the facts were different.

it was rational for the legislature to require disclosure as a condition to holding an insurance license in the state. The court below found that the HVIRA satisfied this test. App. at 22a-27a. Gerling cites no authority for the proposition that a state's authority to grant, to withhold, or to suspend a business license is subject to their "lack of control" and foreign law defenses, and no authority supports that proposition.

Rational economic regulation cannot be thwarted by the fact that relevant information is in the hands of an offshore parent or affiliate company or is allegedly barred from disclosure by foreign law. App. at 27a. If Gerling's position were accepted, legitimate state (and federal) regulation could be defeated by the simple act of either moving documents outside the state to an affiliated company or incorporating in countries that have enacted, or are willing to enact, laws blocking disclosure of critical information.

European insurance regulatory law also requires the denial of a license where a prospective or actual licensee claims that foreign law prevents its disclosure of relevant information. Thus, European Parliament and Council Directive 95/25/EC provides that member states' regulatory "authorities shall also refuse authorization if the law, regulations or administrative provisions of a non-member country . . . prevent the effective exercise of their supervisory functions." ER 2748. This European law exemplifies the recognized need of local regulators to condition the licensing of companies that do business in their jurisdictions on the receipt of information rationally deemed relevant, wherever it is located. As the European Community itself recognizes, if inconsistent foreign law prevents disclosure of that information, then the license to do business will not be granted.

Finally, as the Court of Appeals observed (App. at 26a-27a), none of the cases Gerling cites has any bearing upon state licensing requirements, and each is "easily distinguishable." Most involve discovery sanctions under the Federal Rules of Civil Procedure. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v.*

Rogers, 357 U.S. 197 (1958), for example, overturned a sanction of outright dismissal as a penalty for failure to disclose information in violation of foreign law (though this Court indicated that lesser sanctions would be permissible). As the court below noted, this Court expressly limited the reach of *Rogers* to the discovery context, and subsequent decisions by courts of appeal have consistently interpreted that case narrowly. App. at 26a-27a and n.13. No case has ever held that a party unable to comply with a legitimate state licensing requirement can, on due process grounds, nonetheless claim a right to the license. *Id.*

IV. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT REQUIRING A MEANINGFUL HEARING PRIOR TO LICENSE SUSPENSION

Gerling argues that the license suspension hearing to which they are entitled under California's Administrative Procedure Act, Cal. Gov't Code § 11410.10 (2002), is not a "meaningful" hearing, because the HVIRA does not permit the hearing officer to consider excuses for non-compliance based on either foreign law or petitioners' alleged lack of control of the required information. Gerling Petition at 20-22. They argue, in other words, that they have a constitutional right to a hearing to present evidence of defenses that the statute does not permit.

As the court below recognized (App. at 20a-21a), this is obviously a substantive due process challenge dressed in procedural garb. The HVIRA's preclusion of these defenses satisfies substantive due process so long as it has a rational basis, which, as the Court of Appeals held (App. at 22a-27a), it does. Because the California legislature had constitutional power to make the defenses irrelevant, the Court of Appeals correctly held that the hearing to which petitioners are entitled affords them all the process they are due. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 119-120 (1989); *Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125, 1133-1134 (5th Cir. 1993).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

[The McCarran-Ferguson Act,
15 USCS § 1011-1015 (2001)]

§ 1011. Declaration of policy

The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

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§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act [*15 USCS §§ 1* et seq.], and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [*15 USCS §§ 41* et

se.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

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§ 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Act [15 USCS § 1 et seq.] applicable to agreements to, or acts of, boycott, coercion, or intimidation

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act [*15 USCS §§ 1* et seq.], and the Act of October 15, 1914, as amended, known as the Clayton Act and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [*15 USCS §§ 41* et seq.], and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act [*15 USCS §§ 1011* et seq.] shall render the said Sherman Act [*15 USCS §§ 1* et seq.] inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

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§ 1014. Applicability of National Labor Relations Act [29 USCS §§ 151 et seq.] and the Fair Labor Standards Act of 1938

Nothing contained in this Act [*15 USCS §§ 1011* et seq.] shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act [*29 USCS §§ 151* et seq.], or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938,

or the Act of June 5, 1920, known as the Merchant Marine Act 1920.

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§ 1015. Definition of "State"

As used in this Act [*15 USCS §§ 1011* et se q.], the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

APPENDIX B

[The U.S. Holocaust Assets Commission Act of 1998. Act of June 23, 1998, P.L. 105-186, 112 Stat. 611; as amended Dec. 9, 1999, P.L. 106-155, § 2, 113 Stat. 1740.]

Section I. Short title.

This Act may be cited as the "U.S. Holocaust Assets Commission Act of 1998."

Sec. 2. Establishment of Commission.

(a) Establishment. There is established a Presidential Commission, to be known as the "Presidential Advisory Commission on Holocaust Assets in the United States" (hereafter in this Act referred to as the "Commission").

(b) Membership.

(1) Number. The Commission shall be composed of 21 members, appointed in accordance with paragraph (2).

(2) Appointments. Of the 21 members of the Commission –

(A) eight shall be private citizens, appointed by the President;

(B) four shall be representatives of the Department of State, the Department of Justice, the Department of the Army, and the Department of the Treasury (one representative of each such Department), appointed by the President;

(C) two shall be Members of the House of Representatives, appointed by the Speaker of the House of Representatives;

(D) two shall be Members of the House of Representatives, appointed by the minority leader of the House of Representatives;

(E) two shall be Members of the Senate, appointed by the majority leader of the Senate;

(F) two shall be Members of the Senate, appointed by the minority leader of the Senate; and

(G) one shall be the Chairperson of the United States Holocaust Memorial Council.

(3) Criteria for membership. Each private citizen appointed to the Commission shall be an individual who has a record of demonstrated leadership on issues relating to the Holocaust or in the fields of commerce, culture, or education that would assist the Commission in analyzing the disposition of the assets of Holocaust victims.

(4) Advisory panels. The Chairperson of the Commission may, in the discretion of the Chairperson, establish advisory panels to the Commission, including State or local officials, representatives of organizations having an interest in the work of the Commission, or others having expertise that is relevant to the purposes of the Commission.

(5) Date. The appointments of the members of the Commission shall be made not later than 90 days after the date of enactment of this Act.

(c) Chairperson. The Chairperson of the Commission shall be selected by the President from among the members of the Commission appointed under subparagraph (A) or (B) of subsection (b)(2).

(d) Period of appointment. Members of the Commission shall be appointed for the life of the Commission.

(e) Vacancies. Any vacancy in the membership of the Commission shall not affect its powers, but shall be filled in the same manner as the original appointment.

(f) Meetings. The Commission shall meet at the call of the Chairperson at any time after the date of appointment of the Chairperson.

(g) (Quorum. 11 members of the Commission shall constitute a quorum, but a lesser number of members may hold meetings.

Sec. 3 Duties of the Commission.

(a) Original research.

(1) In general. Except as otherwise provided in paragraph (3), the Commission shall conduct a thorough study and develop a historical record of the collection and disposition of the assets described in paragraph (2), if such assets came into the possession or control of the Federal Government, including the Board of Governors of the Federal Reserve System and any Federal reserve bank, at any time after January 30, 1933 –

(A) after having been obtained from victims of the Holocaust by, on behalf of, or under authority of a government referred to in subsection (c);

(B) because such assets were left unclaimed as the result of actions taken by, on behalf of, or under authority of a government referred to in subsection (c); or

(C) in the case of assets consisting of gold bullion, monetary gold, or similar assets, after such assets had been obtained by the Nazi government of Germany from governmental institutions in any area occupied by the military forces of the Nazi government of Germany.

(2) Types of assets. Assets described in this paragraph include –

(A) gold, including gold bullion, monetary gold, or similar assets in the possession of or under the control of the Board of Governors of the Federal Reserve System or any Federal reserve bank;

(B) gems, jewelry, and nongold precious metals;

(C) accounts in banks in the United States;

(D) domestic financial instruments purchased before May 8, 1945, by individual victims of the Holocaust, whether recorded in the name of the victim or in the name of a nominee;

(E) insurance policies and proceeds thereof;

(F) real estate situated in the United States;

(G) works of art; and

(H) books, manuscripts, and religious objects. For full classification, consult USCS Tables volumes.

(3) Coordination of activities. In carrying out its duties under paragraph (1), the Commission shall, to the maximum extent practicable, coordinate its activities with, and not duplicate similar activities already being undertaken by, private individuals, private entities, or government entities, whether domestic or foreign.

(4) Insurance policies.

(A) In general. In carrying out its duties under this Act, the Commission shall take note of the work of the National Association of Insurance Commissioners with regard to Holocaust-era insurance issues and shall encourage the National Association of Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign, doing business in the United States at any time after January 30, 1933, that issued any individual life, health, or property-casualty insurance policy to any individual on any list of Holocaust victims, including the following lists:

(i) The list maintained by the United States Holocaust Memorial Museum in Washington, D.C., of Jewish Holocaust survivors.

(ii) The list maintained by the Yad Vashem Holocaust Memorial Authority in its Hall of Names of individuals who died in the Holocaust.

(B) Information to be included. The report on insurance companies prepared pursuant to subparagraph (A) should include the following, to the degree the information is available:

(i) The number of policies issued by each company to individuals described in such subparagraph.

(ii) The value of each policy at the time of issue.

(iii) The total number of policies, and the dollar amount, that have been paid out.

(iv) The total present-day value of assets in the United States of each company.

(C) Coordination. The Commission shall coordinate its work on insurance issues with that of the international Washington Conference on Holocaust-Era Assets, to be convened by the Department of State and the United States Holocaust Memorial Council.

(b) Comprehensive review of other research. Upon receiving permission from any relevant individuals or entities, the Commission shall review comprehensively any research by private individuals, private entities, and non-Federal government entities, whether domestic or foreign, into the collection and disposition of the assets described in subsection (a)(2), to the extent that such research focuses on assets that came into the possession or control of private individuals, private entities, or non-Federal government entities within the United States at any time after January 30, 1933, either –

(1) after having been obtained from victims of the Holocaust by, on behalf of, or under authority of a government referred to in subsection (c); or

(2) because such assets were left unclaimed as the result of actions taken by, on behalf of, or under authority of a government referred to in subsection (c).

(c) Governments included. A government referred to in this subsection includes, as in existence during the period beginning on March 23, 1933, and ending on May 8, 1945 –

(1) the Nazi government of Germany;

(2) any government in any area occupied by the military forces of the Nazi government of Germany;

(3) any government established with the assistance or cooperation of the Nazi government of Germany; and

(4) any government which was an ally of the Nazi government of Germany.

(d) Reports.

(1) Submission to the President. Not later than December 31, 2000, the Commission shall submit a final report to the President that shall contain any recommendations for such legislative, administrative, or other action as it deems necessary or appropriate. The Commission may submit interim reports to the President as it deems appropriate.

(2) Submission to the Congress. After receipt of the final report under paragraph (1), the President shall submit to the Congress any recommendations for legislative, administrative, or other action that the President considers necessary or appropriate.

Sec. 4. Powers of the Commission.

(a) Hearings. The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers advisable to carry out this Act.

(b) Information from Federal agencies. The Commission may secure directly from any Federal department or agency such information as the Commission considers necessary, to carry out this Act. Upon request of the Chairperson of the Commission, the head of any such department or agency shall furnish such information to the Commission as expeditiously as possible.

(c) Postal services. The Commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the Federal Government.

(d) Gifts. The Commission may accept, use, and dispose of gifts or donations of services or property.

(e) Administrative services. For the purposes of obtaining administrative services necessary to carry out the purposes of this Act, including the leasing of real property for use by the Commission as an office, the Commission shall have the power to –

(1) enter into contracts and modify, or consent to the modification of, any contract or agreement to which the Commission is a party; and

(2) acquire, hold, lease, maintain, or dispose of real and personal property.

Sec. 5. Commission personnel matters.

(a) Compensation. No member of the Commission who is a private citizen shall be compensated for service on the Commission. All members of the Commission who are officers or employees of the United States shall serve without compensation in addition to that received for their services as officers or employees of the United States.

(b) Travel expenses. The members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code [*5 USCS §§ 5701* et seq.], while away from their homes or regular places of business in the performance of services for the Commission.

(c) Executive director, deputy executive director, general counsel, and other staff.

(1) In general. Not later than 90 days after the selection of the Chairperson of the Commission under section 2, the Chairperson shall, without regard to the civil service laws and regulations, appoint an executive director, a deputy executive director, and a general counsel of the Commission, and such other additional personnel as may be necessary to enable the Commission to perform its duties under this Act.

(2) Qualifications. The executive director, deputy executive director, and general counsel of the Commission shall be appointed without regard to 'Political affiliation, and shall possess all necessary security clearances for such positions.

(3) Duties of executive director. The executive director of the Commission shall –

(A) serve as principal liaison between the Commission and other Government entities;

(B) be responsible for the administration and coordination of the review of records by the Commission; and

(C) be responsible for coordinating all official activities of the Commission.

(4) Compensation. The Chairperson of the Commission may fix the compensation of the executive director, deputy executive director, general counsel, and other personnel employed by the Commission, without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code [*5 USCS §§ 5101* et seq., 5331 et seq.], relating to classification of positions and General Schedule pay rates, except that –

(A) the rate of pay for the executive director of the Commission may not exceed the rate payable for level III of the Executive Schedule under section 5314 of title 5, United States Code; and

(B) the rate of pay for the deputy executive director, the general counsel of the Commission, and other Commission personnel may not exceed the rate payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code.

(5) Employee benefits.

(A) In general. An employee of the Commission shall be an employee for purposes of chapters 83, 84, 85, 87, and 89 of title 5, United States Code [*5 USCS §§ 8301* et seq., 8401 et seq. 8501 et seq., 8701 et seq.,

8901 et seq.], and service as an employee of the Commission shall be service for purposes of such chapters.

(B) Nonapplication to members. This paragraph shall not apply to a member of the Commission.

(6) Office of Personnel Management. The Office of Personnel Management –

(A) may promulgate regulations to apply the provisions referred to under subsection (a) to employees of the Commission; and

(B) shall provide support services, on a reimbursable basis, relating to –

(i) the initial employment of employees of the Commission; and

(ii) other personnel needs of the Commission.

(d) Detail of Government employees. Any Federal Government employee may be detailed to the Commission without reimbursement to the agency of that employee, and such detail shall be without interruption or loss of civil service status or privilege.

(e) Procurement of temporary and intermittent services. The Chairperson of the Commission may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, at rates for individuals which do not exceed the daily equivalent of the annual rate of basic pay prescribed for level V of the Executive Schedule under section 5316 of such title.

(f) Staff qualifications. Any person appointed to the staff of or employed by the Commission shall be an individual of integrity and impartiality.

(g) Conditional employment.

(1) In general. The Commission may offer employment on a conditional basis to a prospective employee pending the completion of any necessary security clearance background investigation. During the pendency of any such investigation, the Commission shall ensure that such conditional employee is not given and does not have access to or responsibility involving classified or otherwise restricted material.

(2) Termination. If a person hired on a conditional basis as described in paragraph (1) is denied or otherwise does not qualify for all security clearances necessary for the fulfillment of the responsibilities of that person as an employee of the Commission, the Commission shall immediately terminate the employment of that person with the Commission.

(h) Expedited security clearance procedures. A candidate for executive director or deputy executive director of the Commission and any potential employee of the Commission shall, to the maximum extent possible, be investigated or otherwise evaluated for and granted, if applicable, any necessary security clearances on an expedited basis.

Sec. 6. Administrative support services.

Upon the request of the Commission, the Administrator of General Services shall provide to the Commission, on a reimbursable basis, the administrative support

services necessary for the (Commission to carry out its responsibilities under this Act.

Sec. 7. Termination of the Commission.

The Commission shall terminate 90 days after the date on which the Commission submits its final report under section 3.

Sec. 8. Miscellaneous provisions.

(a) Inapplicability of FACA. The Federal Advisory Committee Act (5 U.S.C. App.) does not apply to the Commission.

(b) Public attendance. To the maximum extent practicable, each meeting of the Commission shall be open to members of the public.

Sec. 9. Authorization of appropriations.

There are authorized to be appropriated not more than $ 6,000,000, in total, for the interagency funding of activities of the Commission under this Act for fiscal years 1998, 1999, 2000, and 2001, of which, notwithstanding section 1346 of title 31, *United States Code, and section 611* of the Treasury and General Government Appropriations Act, 1998 [unclassified], $537,000 shall be made available in equal amounts from funds made available for fiscal year 1998 to the Departments of Justice, State, and the Army that are otherwise unobligated. Funds made available to the Commission pursuant to this section shall remain available for obligation until December 31, 1999.

APPENDIX C

CHAPTER 4. HOLOCAUST ERA INSURANCE REGISTRY

Section

13800. Short title

13801. Legislative findings and declarations.

13802. Definitions.

13803. Holocaust Era Insurance Registry.

13804. Insurers; disclosure of information; certification.

13805. Civil penalty.

13806. Suspension of certificate of authority.

13807. Regulations.

§ 13800. Short title

This chapter shall be known and may be cited as the Holocaust Victim Insurance Relief Act of 1999. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13801. Legislative findings and declarations

The Legislature finds and declares the following:

(a) During World War II, untold millions of lives and property were destroyed.

(b) In addition to the many atrocities that befell the victims of the Nazi regime, insurance claims that rightfully should have been paid out to the victims and their families, in many cases, were not.

(c) In many instances, insurance company records are the only proof of insurance policies held. In some cases, recollection of those policies' very existence may have perished along with the Holocaust victims.

(d) At least 5,600 documented Holocaust survivors are living in California today. Many of these survivors and their descendents have been fighting for over 50 years to persuade insurance companies to settle unpaid or wrongfully paid claims. Survivors are asking that insurance companies come forth with any information they possess that could show proof of insurance policies held by Holocaust victims and survivors, in order to ensure that closure on this issue is swiftly brought to pass.

(e) Insurance companies doing business in the State of California have a responsibility to ensure that any involvement they or their related companies may have had with insurance policies of Holocaust victims are disclosed to the state and to ensure the rapid resolution of these questions, eliminating the further victimization of these policyholders and their families.

(f) The international Jewish community is in active negotiations with responsible insurance companies through the International Commission on Holocaust Era Insurance Claims to resolve all outstanding insurance claims issues. This chapter is necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California as necessary. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13802. Definitions

For purposes of this chapter, the following definitions shall apply:

(a) "Holocaust victim" means any person who was persecuted during the period of 1929 to 1945, inclusive, by Nazi Germany, its allies, or sympathizers.

(b) "Related company" means any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer.

(c) "Proceeds" means the face value or other payout value of insurance policies and annuities plus reasonable interest to date of payment without diminution for wartime or immediate postwar currency devaluation. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13803. Holocaust Era Insurance Registry

The commissioner shall establish and maintain within the department a central registry containing records and information relating to insurance policies, as described in Section 13804, of Holocaust victims, living and deceased. The registry shall be known as the Holocaust Era Insurance Registry. The Attorney General, in coordination with the department, shall establish appropriate mechanisms to ensure public access to the registry. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13804. Insurers; disclosure of information; certification

(a) Any insurer currently doing business in the state that sold life, property, liability, health, annuities, dowry,

educational, or casualty insurance policies, directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945, whether the sale occurred before or after the insurer and the related company became related, shall, within 180 days following enactment of this act, file or cause to be filed the following information with the commissioner to be entered into the registry:

(1) The number of those insurance policies.

(2) The holder, beneficiary, and current status of those policies.

(3) The city of origin, domicile, or address for each policyholder listed in the policies.

(b) In addition, each insurer subject to subdivision (a) shall certify to any of the following:

(1) That the proceeds of the policies described in subdivision (a) have been paid to the designated beneficiaries or their heirs where that person or persons, after diligent search, could be located and identified.

(2) That the proceeds of the policies where the beneficiaries or heirs could not, after diligent search, be located or identified, have been distributed to Holocaust survivors or to qualified charitable nonprofit organizations for the purpose of assisting Holocaust survivors.

(3) That a court of law has certified in a legal proceeding resolving the rights of unpaid policyholders, their heirs, and beneficiaries, a plan for the distribution of the proceeds.

(4) That the proceeds have not been distributed and the amount of those proceeds.

An insurer who certifies as true any material matter pursuant to this subdivision, which the insurer knows to be false, is guilty of a misdemeanor.

(c) An insurer currently doing business in the state that did not sell any insurance policies in Europe prior to 1945, shall not be subject to this section if a related company, whether or not authorized and currently doing business in the state, has made a filing under this section. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13805. Civil penalty

Any insurer that knowingly files information about a policy required by this chapter that is false shall, with respect to that policy, be liable for a civil penalty not to exceed five thousand dollars ($5,000), which penalty is hereby appropriated to the department to be used by it to aid in the resolution of Holocaust insurance claims. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13806. Suspension of certificate of authority

The commissioner shall suspend the certificate of authority to conduct insurance business in the state of any insurer that fails to comply with the requirements of this chapter by the 210th day after this section becomes effective, until the time that the insurer complies with this chapter. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13807. Regulations

The commissioner shall adopt rules to implement this chapter within 90 days of its effective date. The rules shall be adopted as emergency regulations in accordance with Chapter 3.5 (commencing with Section 11340) of the Government Code, and for the purposes of that chapter, including Section 11349.6 of the Government Code, the adoption of the rules shall be considered by the Office of Administrative Law to be necessary for the immediate preservation of the public peace, health and safety, and general welfare. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

APPENDIX D

Testimony of Leslie Tick
California Department of Insurance
United States House of Representatives
Government Reform Subcommittee on
Government Efficiency, Financial Management
and Intergovernmental Relations.
September 24, 2002
2:00 pm.

Good afternoon. My name is Leslie Tick. I am senior staff counsel at the California Department of Insurance. I have been with the Department for the past 10 years and have worked on the Holocaust-era insurance issue since late 1997.

In pre-war Europe, insurance was sold extensively and primarily to middle and working class people. Many individuals invested in life insurance policies and in annuities because retirement planning tools, such as pensions, were not widely available. Dowry and education policies were also very common during this time. These policies were purchased when a child was born and paid when a daughter married or a son commenced higher education.

As the religious, ethnic and political repression preceding World War II spread, and later, as the war and Holocaust enveloped Europe, more people purchased insurance products in an effort to keep their assets safe.

Over the past 50 years, some insurers have consistently refused to pay benefits or provide information about these policies. The reasons given for non-payment include:

- No death certificate provided by the claimant;
- Policyholders stopped making premium payments during the war;
- Proceeds of policies sold to Jewish insureds were already paid to the Nazis or nationalized;
- Reparations to Holocaust survivors were made by government restitution treaties, which covered insurance proceeds;
- Companies located in eastern bloc countries were taken over by communist regimes and their assets were confiscated so that no funds exist to pay claims; and
- Records no longer exist to verify the individual's status as a policyholder beneficiary.

An estimated 50,000 to 100,000 Holocaust survivors live in the United States. California has the second largest number of survivors with estimates ranging from 6,300 to 20,000 survivors. If these policies were paid today, at present value with currency adjustments and interest, it is estimated that the total due could reach into the hundreds of millions of dollars.

In order to see that justice is done and provide assistance to those survivors who may wish to file claims on these policies, information needs to come from the insurance companies. Most survivors and their heirs no longer have documentary proof of insurance. Most survivors were children during the war. Some recall details regarding insurance – the agent coming to their home for payment, or their parents telling them that they were insured. The majority of claimants, however, have no actual knowledge of whether or not their family members were insured, but believe they must have been because of their social and

economic status, business holdings, or because they believe that their parents took good care of the family.

The International Commission on Holocaust Era Insurance claims (ICHEIC) was formed in August 1998 to try to address the issues surrounding these policies in a consensual manner. The ICHEIC is made up of a few European insurers (Allianz, Generali, Zurich, AXA and Winterthur), American and European insurance regulators, representatives of Jewish and survivor organizations, and the State of Israel. In order to address the problem of claimants' lack of records, ICHEIC required each member company to provide a list of unpaid policies issued to Holocaust victims. It was envisioned that this list would be made available to the public so that potential claimants would be able to see if they or their relatives had a policy.

ICHEIC required that its member companies provide lists of policies held by victims of the Holocaust, but left each insurer to decide who was and who was not a victim of the Holocaust. Even if some names are known as "Jewish names" a company cannot determine with certainty which policyholder was, or was not, a Jew. And for those who were victims by virtue of the fact that they were homosexual, Roma, disabled, or Jehovah's Witness, for example, it would be entirely impossible.

Another problem arose from ICHEIC's requirement that the insurers provide policyholder names just for those policies that remained unpaid. There was a widespread practice during the pre-war and war years for the Nazis to confiscate policies outright or for the policies held by victims to be paid into "blocked accounts." These "blocked accounts" were in the policyholder's name, but the account only worked one way. The accountholder was forced to

deposit his assets, but was not allowed to make any withdrawals. Unfortunately, the insurers considered these policies to be "paid" even though they were not paid to the beneficiary of the policy, and these names were not included on the lists.

Another problem with the ICHEIC lists is that most of the ICHEIC insurers simply refused to provide lists, saying that European law would forbid such disclosure, or saying that it would simply take too much time and cost too much money to collect the data. Allianz, for example, with approximately 1.3 million paper files, refused to put the information into electronic format, citing cost and difficulty and its decision that such an effort would be unlikely to yield enough Jewish policyholders to make the exercise cost effective. Allianz eventually agreed with ICHEIC to digitize information regarding a small sampling of the 1.3 million policies and to match those names against the Yad Vashem[1] database of Jews killed in the Holocaust, in order to determine which of the policies were victims of the Holocaust. The Yad Vashem database, however, contains the names of only about half of Jewish victims of the Holocaust. The matching was ultimately never done, as Allianz was not willing to agree to the Yad Vashem matching system and so, to date, there are no Allianz names on the ICHEIC database that came from this exercise.

ICHEIC also undertook limited research of non-insurer archives for evidence of individual policies. ICHEIC searched state archives in various locations around

[1] Yad Vashem is the Holocaust memorial in Israel, which to date, has the world's largest collection of names of Jewish Holocaust victims.

Europe and looked mostly at documents reflecting the forced documentation of Jewish assets to be either taxed by or collected by the Nazis. These names were collected in ICHEIC's research database and were added to the policyholder database that is publicly available on ICHEIC's website (www.icheic.org).

To date the ICHEIC policyholder database contains 59,244 policyholder names. Only 15% of those names (8,929) came from ICHEIC's member insurers. Of the 8,929 provided by the insurers, 94% (8,388 names) come from just one company. Generali, which provided 94% of the names on the ICHEIC database, actually collected information on 360,000 policies in force in 1939 but was only willing to give ICHEIC a smaller list of 90,000 "unpaid" policies. Those were then matched against the Yad Vashem list, resulting in the 8,388 names currently published.

When the German Foundation negotiations are completed, the German insurers say that they will provide a list of names of policies in force, to be matched against a list of German Jews. Virtually none of these names will come from Allianz, as the German insurers agreed to provide those names that were already in electronic format. The resulting matched names will be added to the ICHEIC website database. Since the matching will be done against a list of German Jews, it will not capture homosexual, disabled, Jehovah's Witness or Roma victims of the Nazis.

In contrast to the ICHEIC list requirements, AB 600, codified as California Insurance Code § 13800 (attached) directs insurers to provide to the Department data regarding *all* insurance policies they or a related company wrote in Europe between 1920 and 1945. This requirement addresses the problem of insurers deciding for themselves

who was and who was not a victim of the Nazis and deciding which policies were paid and which were not paid. It also allows survivors and the families of victims who were not targeted because they were Jews, to be able to search for names.

The statute directs the Department to suspend the certificate of authority of any insurer that fails to comply. The statute required insurers to provide their data to the Department of Insurance by April 10, 2000.

Beginning in March 2000, various insurance companies (Gerling, Generali, American Reinsurance, Winterthur) and the trade association American Insurance Association (representing an additional one hundred or so insurers), filed four separate federal lawsuits against the California Insurance Commissioner asserting that the statute and its implementing regulations violated their federal constitutional rights.

On June 9, 2000, the United States District Court for the North District of California granted plaintiffs' request and enjoined enforcement of the statute.

On February 7, 2001, the United States Court of Appeals for the Ninth Circuit rejected the insurers' commerce clause and foreign affairs constitutional challenges. (Opinion attached as Exhibit 2). The Court kept the injunction in place pending proceedings on the merits regarding due process, the insurers' one remaining constitutional challenge.

In September 2001 the parties argued cross motions for summary judgment on the due process issues. On October 1, 2001, the District Court denied the Commissioner's Motion for Summary Judgment and granted Plaintiffs'

motions, finding that the statute violated the insurers' due process rights.

Both sides took the due process ruling back to the 9th Circuit Court of Appeals. The Court heard oral argument on May 8, 2002.

On July 15, 2002, the Court of Appeals ruled that the statute was not unconstitutional for any of the reasons set forth by plaintiffs (amended Opinion attached as Exhibit 3).

The Court of Appeals denied plaintiffs' request for rehearing en banc on September 9, 2002.

On September 13, 2002 the insurers requested that the Court stay the ruling pending their request to the United States Supreme Court that it hear the case.

Prior to the injunction, which prevented the California Department of Insurance from enforcing the statute, approximately 1,500 California insurers submitted reports.

Four groups representing approximately eight insurers provided reports that fully comply with the statute.

Four groups representing approximately forty-three California insurers provided partial, incomplete submissions, such as policy information regarding unpaid policies issued to Holocaust victims.

The Department has further questions regarding the reports submitted by five groups representing approximately fifty-eight insurers.

Approximately one hundred insurers refused to comply.

The remainder, and overwhelming majority of the insurers reported that they either wrote no insurance in Europe during the applicable time period or that they searched and were unable to find any data responsive to the statute.

APPENDIX E

Statement of Representative Henry A. Waxman
Ranking Minority Member
Committee on Government Reform
at the Subcommittee on Government Efficiency,
Financial Management and Intergovernmental
Relations Hearing on H.R. 2693
September 24, 2002

Today we are holding a hearing on important legislation to help rectify a terrible injustice. The bill is the Holocaust Victims Insurance Relief Act (H.R. 2693). It addresses one of the most difficult problems faced by Holocaust survivors and their families when they seek restitution from insurance companies that have refused to pay claims held by victims of Nazi persecution: How to identify the insurance company that issued the policy.

At the outset, I would like to thank Chairman Horn and Ranking Member Schakowsky. They are both original cosponsors of the legislation before us today. I am very pleased that they have agreed to schedule this hearing to help achieve justice for Holocaust survivors and their families.

The history of Holocaust insurance is shameful. After the war, survivors filing claims for life insurance often were rejected for the cruelest of reasons. Some survivors were rejected because they could not produce death certificates for loved ones who perished in Nazi concentration camps. Other insurance companies took advantage of the fact that claimants had no policy documents to prove their policy existed. In many cases, survivors recalled that their families had insurance but could not name the company holding their assets.

In 1998, the International Commission on Holocaust-Era Insurance Claims (ICHEIC) was set up as a forum for the insurance companies to expeditiously settle outstanding policies. In November 2001, our full Committee held an oversight hearing on the ICHEIC process. We found the work of ICHEIC disheartening.

At the time, ICHEIC had received 77,800 claims for restitution, but had resolved only 758 – less than 1%. Today, nearly a year later, the statistics are not much better.

One of the main problems confronting the ICHEIC process was the difficulty in getting names of Holocaust-era policyholders. At the time of the hearing, less than 10,000 policyholder names had been published by the companies involved in ICHEIC and most of those names came from just one company. Without comprehensive policyholder lists to search for the names of family members, more than 80% of ICHEIC applicants filed incomplete claims naming no insurance company at all. As a result, the rate of claims approval was very small.

A representative case is that of Israel Arbeiter, a Holocaust survivor who was born in Poland and came to the United States after being liberated from Auschwitz. As he testified at last year's hearing, Mr. Arbeiter knows his family had insurance policies because he vividly remembers that every week an agent of an insurance company visited his home to collect premiums. The records were kept in a ledger left behind when the Nazi SS stormed into his home in February 1941. But he never knew which company had issued the policies of his parents and uncles who were killed at the Treblinka death camp. As a result, ICHEIC has been unable to resolve his claim.

The purpose of the legislation we are considering today is to help Mr. Arbeiter and the countless others who are in the same situation. H.R. 2693 requires all insurance companies operating in the United States to provide information about Holocaust-era policyholders to the U.S. government for publication by the Holocaust-Era Assets Recovery Project of the National Archives.

We know this bill can work. It is patterned after a California state law which has already produced positive results within California. In fact, we will hear today from MONY Life Insurance, an insurance company that is fully complying with the California law. Because of the California law, policy information is getting out of companies' archives and into the hands of the rightful beneficiaries.

There has been one positive development recently. Today, we will have the opportunity to hear about a new agreement that was announced last week between ICHEIC and the companies in the German Insurance Association. Under the agreement, the names of Jewish policyholders who lived in Germany after 1933 are to be released publicly. Assuming that the German insurance companies actually comply and that a reliable list of Jews who lived in Germany can be compiled, this could help many families in filing restitution claims.

But this agreement – welcome as it may be – will not solve the problems. For one thing, it will not help Mr. Arbeiter and others like him because he came from areas under Nazi control, not Germany proper.

What's clearly needed is a legislative response by Congress that will in effect compel recalcitrant insurance companies to provide complete lists of Holocaust-era policyholders. That's the goal of H.R. 2693.

Again, I commend Chairman Horn for holding this hearing and I look forward to hearing from the witnesses.

APPENDIX F

**Prepared Statement of David S. Waldman,
Vice President-Chief Operations Counsel
MONY Life Insurance Company
For the House Committee on the Government
Reform's Sub-committee on Government
Efficiency, Financial Management
and Inter-Governmental Relations
Hearing on H.R. 2693 on
September 24, 2002**

Good afternoon, honorable members of the Sub-Committee. My name is David Waldman and I am the Vice President-Chief Operations Counsel of MONY Life Insurance Company, formerly The Mutual Life Insurance Company of New York, which was chartered in 1842 and issued the first mutual life insurance policy in the United States. It was my responsibility to provide legal advice to the team of individuals at our Company who prepared and filed the reports required under the various state Holocaust Victim Insurance Relief Acts, including that of California. Thank you for inviting me to testify before this Committee and for affording me the opportunity to share with you our experience in complying with the California Act.

In response to the enactment of the various state Holocaust Victim reporting laws applicable to insurance companies, MONY conducted an extensive and exhaustive examination of its records relating to its European business, including an attempt to identify any policies sold to persons in Europe that would have been in effect between 1920 and 1945.

Such records as did exist indicated that MONY sold life insurance and annuity products in Europe in the early 1900's. However, MONY completely discontinued writing new business in Europe by 1914. Moreover, it appeared that in the 1920-26 time period, MONY disposed of virtually all its existing European business by transfer, with the consent of the policyholder, to European domiciled insurers.

There were a number of policies in various European countries that were not transferred, and we conducted a detailed investigation of any documentation we might have concerning them. There were several boxes of paper files, related record cards on microfilm and policy payment vouchers in the archives area of our record center dating back to the relevant time period. The review of our paper files resulted in the identification and inputting of 6,813 potentially relevant policies.

The next step was the retrieval of material data on these policies as well as on an eventual 4,700 additional policies which were identified in our records center as potentially relevant. This investigative process resulted in the definite identification of 6,149 policies sold to persons in Europe, as defined under the California Act, that were in effect between 1920 and 1945. We reviewed our records from that era including cards denoting policy status in numerical order covering the entire period in question and vouchers evidencing payment dating from 1926. The data obtained from this research, together with any additional information obtained from our files, was then input into our database and organized into a format conforming with the prescriptions of the Act.

Subsequent to this initial examination, we embarked upon a second phase which consisted of a direct review of all our policy records during the relevant time period and an identification of the policies derived from those records sold to persons in Europe that were in effect between 1920 and 1945. The number of policies identified in this second phase was 27,603. The data for these policies was combined with that for the 6,149 identified in the first phase and incorporated into a report reflecting the data for the total of 33,752 policies.

The review of our records resulted in our finding only two cases identifiable as Holocaust Victim claims, one with an agency of record of Brussels and the other in the United States. Both included references to concentration camps on the death benefit voucher as the cause of death; one indicated payment of proceeds in 1945 and the other in 1950. In addition, there was one claim with a cause of death listed as "killed by Germans;" and payment of proceeds was indicated in 1949.

The interpretation and inputting of data from our files was an extremely resource-intensive and time-consuming task. We eventually had four persons in our Operations area and three temporary workers dedicated full-time to the project, and expended over 8,286 hours in identifiable staff time.

This work did serve as the basis for our reports to all the states that have enacted Holocaust Victim Insurance Relief Acts, although some adjustments were needed to define and populate the databases used in the various states due to the differing wording in their laws, particularly in the time periods and geographic areas covered. For example, while California law applies to policies in effect between

1920 and 1945 and sold to persons in areas in the European Continent that were at some time occupied or controlled by Nazi Germany or its allies, other state laws apply to policies issued between 1920 and 1945 to a Holocaust Victim which may include persons in any other neutral European country or area in Europe under the influence or threat of Nazi invasion. The database we created also allowed us to respond in quick order to inquiries we received on particular individuals either directly, through State Insurance Departments or from the International Commission on Holocaust Era Insurance Claims. I may add that in no case was there any documentary evidence of a failure on our part to pay, or an improper payment of, the proceeds of a policy on the life of a Holocaust Victim or the claim of a Holocaust Survivor, or any attempt on our part to avoid our contractual obligations under any of the policies found in our records.

In closing, I would like to express my appreciation to the extremely dedicated group of individuals MONY Life assigned to this project who worked tirelessly and with heartfelt concern for the subject matter until it was completed, and to MONY Life which willingly devoted the resources necessary to do a good job, not only because it was the law but also because it was the right thing to do.

Exhibit A

Assumptions Underlying California Report

In some cases the terminology prescribed for the layout was not reflective of the actual policy designations or transactions; in such cases we added appropriate descriptions. As the records requested were from a time that extended well beyond what our normal record retention

guidelines would have covered, much of the data was nonexistent, illegible, and/or incomplete, which we indicated on the report, except in such cases where we were able to make reasonable assumptions. A synopsis of those assumptions follows.

1. A policy was included in the report where our records indicated a City or country of Origin or Domicile in Europe as defined in the California regulations and a year reflecting an in force status between 1920 and 1945.

2. The agency of record where the policy was issued and the location of that agency were reported as Policyholder and Insured City/Country of Domain, which corresponded to City of Origin or Domicile and Country in California's prescribed layout.

3. Since the policy payment vouchers in our records only dated from 1926, the best evidence of payment prior to that date was the record cards. Payment would ordinarily have been made within one year of the effectuating event. Consequently, if the record card noted that a policy that went out of force prior to 1926 was a death or maturity, we assumed that payment of the proceeds was made to the person entitled to them under the policy. Conversely, if the record card noted that a policy went out of force 1926 or later, we did not report that a payment was made on a death or maturity unless there was a corresponding payment voucher for the policy. If there was a payment voucher for the policy, then we assumed that payment was made. Where the record card noted a surrender, we assumed that payment was made to the person entitled to payment for all years regardless of whether there was a payment voucher for the policy, since a surrender would have been precipitated by the policyholder contacting us

and minimal requirements would have been applicable to payment.

4. With regard to policy payment vouchers, the standard guidelines we followed were to look for a voucher for the year noted on the policy record card plus an additional seven years (a typical escheat period of the time) for a death or maturity, but only one additional year for a surrender based on the same reasoning that resulted in our differentiated treatment of surrenders under 3. above.

5. If payment was made, then we assumed it was made to the person entitled to payment under the policy unless there was documentation to the contrary. This would have been reported as Bene/Heir in accordance with California's prescribed layout even though the payee would generally have been, for example, the owner in the case of a surrendered policy or a matured endowment and the annuitant in the case of a supplementary annuity contract in settlement of a policy. For annuities, the annuitant was also reported as the Insured. When our records only reflected a person named with no identifying label, we assumed that person was the Insured.

6. N/R inserted in a field indicated either that no records existed for that field, the records we did have in our files for that field were illegible, incomplete or otherwise nonresponsive, or the field was not applicable (e.g., payee data where proceeds were not payable).

7. Amount of proceeds was only reported where our files indicated Unpaid, in accordance with California's prescribed layout. The amount unpaid was reported in the Amount Paid field only if the amount was known to us. If the amount was not known to us, it was reported as N/R. If our files indicated Paid, that field was reported as N/R,

which in this case denoted not applicable (to California's reporting requirements).

8. For payments assumed prior to 1926 (where no vouchers would have existed), payment method (if applicable) was reported N/R (no records exist). For payments made after 1926 (where a voucher was found), it was assumed that payment method (if applicable) was Paid Directly unless there was documentation to the contrary.

9. Where our records identified a year for a transaction or occurrence but not an exact date, it was assumed that it took place at the end of that year.

10. In the case of apparently inconsistent data in our records, it was assumed that the most recent data was also the most accurate.

APPENDIX G

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. – U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL LIFE INSURANCE COMPANY; GERLING AMERICA INSURANCE COMPANY; and CONSTITUTION INSURANCE CORP., Plaintiffs-Appellees, v. HARRY W. LOW,* in his capacity as the COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA, Defendant-Appellant,	No. 00-16163 D.C. No. CV-00-00506-WBS

* Harry W. Low is substituted for his predecessor as Commissioner of Insurance for the State of California. Fed. R. App. P. 43(c)(2).

ASSICURAZIONI GENERALI. Plaintiff-Appellee. v. HARRY W. LOW, individually, and in his capacity as the INSURANCE COMMISSIONER for the STATE OF CALIFORNIA, Defendant-Appellant.	No. 00-16164 D.C. No. CV-00-00875-WBS (Filed Mar. 29, 2001)

* * *

Paez have voted to deny the petition for rehearing en banc, and Judge Goodwin has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

APPENDIX H

Nos. 00-16163, 00-16164, 00-16165, and 00-16182

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERLING GLOBAL REINSURANCE CORP.
OF AMERICA, et al.,

Plaintiffs-Appellees,

v.

CLARK KELSO in his capacity as the
COMMISSIONER OF INSURANCE OF THE
STATE OF CALIFORNIA,

Defendant-Appellant.

BRIEF FOR AMICUS CURIAE THE UNITED STATES OF AMERICA IN SUPPORT OF AFFIRMANCE

ON APPEAL FROM A PRELIMINARY
INJUNCTION ENTERED BY THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA,
THE HONORABLE WILLIAM B. SHUBB

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Attorneys for the United States

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* * *

legal peace," undertakes to "use its best efforts; in a manner it considers appropriate, to achieve these objectives with state and local governments." Art. 2(2).

The Foundation Agreement and the United States' role in its negotiation are unique. The Foundation Agreement is not a government-to-government claims settlement agreement. As the Agreement makes clear, U.S. policy interests favor "dismissal on any valid legal ground," of all "National Socialist and World War II era cases against German companies." Annex B ¶ 3. And the United States undertakes to explain that interest in court proceedings and to take appropriate steps to achieve the objectives of the Agreement with state and local governments. Art. 2(1), (2). At the same time, the Agreement also makes explicit that "the United States does not suggest that its policy interests concerning the Foundation in

themselves provide an independent legal basis for dismissal" of private claims against German companies. Annex B, ¶¶ 3, 7. The Foundation Agreement reflects the United States' policy of fostering voluntary cooperation between the victims' constituencies on one side and the German government and companies on the other to bring expeditious justice to the widest possible population of survivors.

In addition to the Foundation, the United States has also encouraged participation in the International Commission of Holocaust Era Insurance Claims ("ICHEIC"), a voluntary organization which has established procedures for the processing and payment of Holocaust-era insurance claims. As part of the Foundation Agreement, the German government has agreed that such insurance claims against German insurance companies will be processed on the basis of claims-handling procedures established by the ICHEIC. Art. 1(4). ICHEIC is a voluntary organization, chaired by former United States Secretary of State Lawrence S. Eagleburger, formed by five European insurance companies (including plaintiffs Generali and Winterthur), the State of Israel, Jewish organizations, and the National Association of Insurance Commissioners.[2] The State Department has stated that ICHEIC "should be recognized as the exclusive remedies for all insurance claims that date to the Nazi era" and has "encourag[ed] all insurance companies that wrote policies during the Nazi era to join the ICHEIC." State Department Press Statement, Feb. 15,

[2] The United States has observer status in ICHEIC, together with several European nations, including Germany, France, Italy, Poland, and the Czech Republic.

2000.[3] The United States continues to urge all insurance companies that issued Holocaust-era insurance policies to join ICHEIC.

In view of the importance of the Foundation Agreement, we wish to correct some misunderstandings reflected in the brief of the American Insurance Association ("AIA") concerning the undertakings of the U.S. Government and the impact of the procedures established by the Agreement on existing legal remedies available to American citizens against private corporations. AIA states that "[t]he federal government ... has committed to give affected insurers legal peace, including against state litigation and regulatory action," AIA Br. 1, and that the Foundation Agreement "imposes a duty on the United States to achieve 'all-embracing and enduring legal peace' for German companies." AIA Br. 2. The United States has committed to various unprecedented undertakings in the Agreement. As discussed, the United States has committed to file a Statement of Interest in private suits against German companies explaining that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims," Foundation Agreement, Art. 2(1), and has committed to "use its best efforts, in a manner it considers appropriate, to achieve the objectives" of the Agreement, Art. 2(2). It has not, however, undertaken a "duty ... to

[3] Deputy Secretary Eizenstat has likewise stated that the "U.S. Government has supported the International Commission ... since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era." Statement before the House Banking Committee, Feb. 9, 2000 (ER 1905).

achieve" legal peace for German companies against state litigation and regulatory action.

Nor does the Foundation Agreement itself preclude individuals from filing suit on their insurance policies in court. *Cf.*, *e.g.*, AIA Br. at 2 (stating that the Agreement "creates on exclusive remedy and forum"); *id.* at 12 (stating that the Agreement "mandates that insurance claims that come within the scope of . . . ICHEIC 'shall be processed . . . on the basis of such procedures' "). Although the Agreement obligates the German Foundation to process insurance claims against German companies according to ICHEIC procedures, Foundation Agreement, Art. 1(4), it does not mandate that individual policyholders or beneficiaries bring their claims in that forum. And while the Agreement states that it is in the national interest of the United States that the Foundation be the exclusive forum for such claims, it does not "create" an exclusive remedy; rather, it specifically declares that "[t]he United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent basis for dismissal" of private claims. Foundation Agreement, Annex B, ¶ 7.[4] As we discuss below, the premises underlying the Agreement and the California statutes are plainly different. But AIA is mistaken in asserting that the Foundation Agreement [is] in "direct conflict" with California law (AIA Br. 4), if, by this, AIA means to suggest

[4] The district court, which rendered its decision before the Agreement was finalized, also overestimated the Agreement's ultimate legal affect when it predicted that the Agreement would make the Foundation an "exclusive remedy" as a matter of U.S. law. Memorandum and Order: Preliminary Injunction at 17.

that the Agreement by its terms preempts the California statute.

For the reasons set out below, we believe that there are substantial questions that the California statute impairs interests protected by the Foreign Commerce clause and other constitutional restraints and that these questions justify a preliminary injunction. But affirmance of the district court's order should not rest on any misunderstanding about the scope of the Foundation Agreement.

* * *

APPENDIX I

Nos. 00-16163, 00-16164, 00-16165, and 00-16182

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERLING GLOBAL REINSURANCE CORP.
OF AMERICA, et al.,

Plaintiffs-Appellees,

v.

HENRY W. LOW, in his capacity as the
COMMISSIONER OF INSURANCE OF THE
STATE OF CALIFORNIA,

Defendant-Appellant.

BRIEF FOR AMICUS CURIAE THE UNITED STATES OF AMERICA IN SUPPORT OF REHEARING EN BANC

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* * *

interests" for the designated claims process "to be the exclusive remedy and forum for the resolution of, all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II."[6]

The problem with the California legislation is not that it contravenes specific provisions of the Executive-Agreements – it does not.[7] But when a state projects itself

[6] Agreement Art. 1(1). The Agreement with Austria contains a substantially similar provision, which extends as well to claims against the government of Austria. The U.S.-Swiss Joint Statement expresses a similar policy for claims against Swiss companies, though it does not have the force of an Executive Agreement.

[7] Plaintiffs are wrong to represent that the panel's decision has placed "major international agreements ... in jeopardy" and that Holocaust survivors "will get no relief from the German Foundation so long as the panel's decision remains in effect." Under German law, the contribution of German companies to the Foundation, and payments to victims, depend upon a determination by the German Parliament that "adequate legal security" exists. This determination is to be based on the dismissal of lawsuits that were pending at the time the Foundation

(Continued on following page)

into the realm of foreign affairs, its activity may threaten the efficacy of the national government's efforts. That danger is very much present here. The

* * *

Agreement was signed, primarily class action cases, that assert claims *against* German companies that arise out of the Nazi era. This case, however, does not involve claims against any German company – indeed the litigation was brought by the insurance companies themselves – and, therefore, is not one that implicates the German obligation to make payments from the Foundation.

Plaintiffs also err in asserting that the German Foundation Agreement and other international agreements contain a "promise of comprehensive 'legal peace' – in particular, protection of European companies from litigation and from other state and local action, including the HVIRA." App. Pet. at 7. *see also* App. Pet. at 6 (negotiations "premised on a guarantee of 'legal peace' from statutes like the HVIRA"). The Foundation Agreement makes clear that the achievement of "legal peace" for German companies in the context of full implementation of the Foundation is in the foreign policy interests of the United States. Foundation Agreement, Art. 2(1), Annex B, ¶¶ 3, 4. However, the Foundation Agreement does not provide a "promise" or "guarantee" of legal peace.

APPENDIX J

[An unofficial/informal translation of the Bundestag resolution, adopted on May 30, 2001, obtained from the United States Department of State.]

Motion introduced by the parliamentary groups of the SPD, CDU/CSU, Alliance90/Greens, FDP and PDS

Determination of Adequate Legal Certainty for German Enterprises Pursuant to Section 17, Para. 2 of the Law on the Creation of a Foundation "Remembrance, Responsibility, and the Future"

The German Bundestag determines:

1. The Law on the Creation of a Foundation "Remembrance, Responsibility, and the Future" of August 2, 2000 stipulates in Section 17, Para. 2: "The first allocation of funds to the Foundation requires as preconditions the entry into force of the German-American Executive Agreement concerning the foundation "Remembrance, Responsibility, and the Future," and the establishment of adequate legal certainty for German enterprises. The German Bundestag shall determine whether these preconditions exist." The German-Americans Executive Agreement entered into force on October 19, 2000. The German Bundestag shares the view held by the Special Commissioner of the Federal Chancellor, Dr. Otto Count Lambsdorff, and the Federal Government, as well as the concurrent opinion of the Foundation Initiative of German Industry that adequate legal security exists for German enterprises.

2. The German Bundestag determines that adequate legal security has been established pursuant to Section 17,

Para. 2 of the Law on the Creation of a Foundation "Remembrance, Responsibility, and the Future."

The Foundation "Remembrance, Responsibility, and the Future" is therefore authorized to make funds of the foundation available to the partner organizations pursuant to Section 17, Para. 1 of the Law.

3. The German Bundestag takes note of the fact that the Foundation Initiative, according to number 4d of the "Joint Declaration" of July 17, 2000, will pay the contribution of the German enterprises in the amount of DM 5 billion plus at least DM 100 million to the Foundation "Remembrance, Responsibility, and the Future." The German Bundestag understands that these funds will be transferred immediately to the Foundation "Remembrance, Responsibility, and the Future."

Berlin, May 30, 2001

Dr. Peter Struck and parliamentary group
Friedrich Merz and parliamentary group
Kerstin Mueller, Rezzo Schlauch and parliamentary group
Dr. Wolfgang Gerhardt and parliamentary group
Roland Claus and parliamentary group

APPENDIX K

Nos. 01-17023 and 01-17433

UNITED STATES COURT OF APPEALS
IN THE NINTH CIRCUIT

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. – U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL LIFE INSURANCE COMPANY; GERLING AMERICA INSURANCE COMPANY; and CONSTITUTION INSURANCE COMPANY,

Plaintiffs-Appellees/Cross-Appellants,

v.

HARRY LOW in his capacity as the COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Defendant-Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of California
Honorable William B. Shubb, District Judge
CIV-S-00-0506 WBS JFM and Consolidated Cases

MOTION OF THE FEDERAL REPUBLIC OF GERMANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE SUPPORTING AFFIRMANCE OF SUMMARY JUDGMENT FOR PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

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Counsel for Amicus Curiae
Federal Republic of Germany

March 18, 2002

* * *

BAV exercises its authority by issuing "circulars" to insurance companies in Germany. The BAV has reviewed and continues to review the practices of German insurance companies regarding Holocaust-era policies and, in this regard, has issued Circular 1/1999, which requires insurance companies in Germany to "re-check if any benefits to policyholders or beneficiaries under life insurance contracts concluded before 1945 (historical portfolio) are still outstanding."[1]

2. German Sovereignty over the Disclosure of Private Data by German Companies

The Federal Republic also has sovereign authority to regulate the disclosure by German companies in Germany of private personal data concerning German citizens. Pursuant to this sovereign right, the Federal Republic has enacted privacy laws, including the Federal Data Protection Law (Bundesdatenschutzgesetz or BDSG). The BDSG

[1] BAV Circular 1/1999, "Life Insurance Contracts of Jewish and Other Victims of National Socialist Persecution," *available at* http://www.bav.bund.de/en/rundschreiben/r/1999/1.html.

broadly prohibits the disclosure of private data in all sectors of the German economy, including the disclosure of certain information regarding insurance policy records by German insurance companies without the express authorization of policyholders or their beneficiaries. § 28(2) Nr. 1b BDSG. Unauthorized disclosure of private data may result in civil and criminal penalties.

* * *

APPENDIX L

[SEAL]

THE TREASURER OF THE STATE OF FLORIDA
DEPARTMENT OF INSURANCE

BILL NELSON

IN THE MATTER OF:

HOLOCAUST VICTIMS
INSURANCE ACT ENFORCEMENT
PROCEEDING

CASE NO. 31393-99-SC

_____/

INVESTIGATIVE SUBPOENA FOR RECORDS

TO: GERLING GLOBAL LIFE REINSURANCE COMPANY
717 FIFTH AVENUE
NEW YORK, NEW YORK 10022
SERVE: RECORDS CUSTODIAN

In accordance with the authority conferred by Sections 624.307, 624.317, 624.318, 624.321, and Chapter 626, Florida Statutes, the FLORIDA DEPARTMENT OF INSURANCE AND TREASURER (hereafter, the "DEPARTMENT"), is conducting an investigation concerning the insurance activities of GERLING GLOBAL LIFE REINSURANCE COMPANY with respect to its compliance with Section 626.9543, Florida Statutes ("Holocaust Victims Insurance Act"). In furtherance of that investigation, the DEPARTMENT issues this Investigative Subpoena for Records to the entity named above. For the purpose of this investigation and records subpoena, GERLING GLOBAL LIFE REINSURANCE COMPANY includes the entity of that name, as well as any and all other entities that are or were under the control of, that were acquired by, that were merged with or into, or that

now have or have in the past had any organizational, managerial, or operational connection with GERLING GLOBAL LIFE REINSURANCE COMPANY, including, but not limited to as a parent company or as a subsidiary.

YOU ARE THEREFORE COMMANDED to produce, within sixty (60) days from the date of service upon you of this Investigative Subpoena, all materials and information designated on the attached list, regardless of the form or media in which it exists or is stored. If you contend with respect to any request, that records or information is not available, you are required to explain in detail all efforts employed to locate the requested documents or information. Production is to be made at the following location: Florida Department of Insurance, Division of Legal Services, 6th Floor, Larson Building, 200 East Gaines Street, Tallahassee, Florida 32399-0333 (Attention: Luke S. Brown, Esq.).

You must comply with this subpoena by producing true and correct copies of the requested materials to the DEPARTMENT at the place and within the time specified in this subpoena. You will not be required to surrender to the Department the originals of the materials to be provided. Any objections to the production of documents pursuant to this subpoena must be made as soon as reasonably possible before the date that production is due, by serving written notice of specific objections and the grounds therefor to the undersigned attorney.

BILL NELSON
Treasurer and Insurance
Commissioner

By: /s/ Dennis Silverman
DENNIS SILVERMAN, ESQ.
Assistant Director
Division of Legal Services
KAREN ASHER-COHEN, ESQ.
LUKE S. BROWN, ESQ.
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333
Telephone: (850) 413-4118

DEFINITIONS OF TERMS USED IN THIS REQUEST

A. "COMPANY" means the entity named upon the face of this subpoena, as well as any and all other entities that are or were under its control, that were acquired by it, that were merged with or into it, or that now or have at any time in the past had any organizational, managerial, or operational connection with it including, but not limited to, as a parent company or as a subsidiary.

B. "DEPARTMENT" means the Florida Department of Insurance.

C. "HOLOCAUST VICTIM" or "VICTIM" means any person who lost his or her life or property as a result of discriminatory laws, policies, or actions targeted against discrete groups of persons between 1920 and 1945, inclusive, in Nazi Germany, areas occupied by Nazi Germany, or countries allied with Nazi Germany.

D. "INSURANCE POLICY", "POLICY", "INSURANCE POLICIES" or "POLICIES" means all insurance policies, including but not limited to life and property and casualty insurance policies, that were issued by the COMPANY and that were in force at any time between

1920 and 1945, inclusive, in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany.

E. SPECIFIED TIME PERIOD means the years 1920 through 1945, inclusive.

MATERIALS AND INFORMATION TO BE PRODUCED

1. All company files documenting the existence of insurance policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period.

2. All duplicate policies. For purposes of this request, a "duplicate policy" is a copy, a second original, or other reproduction of an insurance policy that was in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period.

3. All records pertaining to policy number designations and prefixes for policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period, including any and all explanatory information as to the numbering or other identification system utilized.

4. All cancellation notices or documents of similar import issued by or on behalf of the company with respect to any policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period.

5. All premium registers or similar data compilations that document gross premiums received by the company on policies issued by it that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period. If your response to this request is in the form of a data compilation, it should be categorized by year and by Country and City.

6. With respect to each policy that was in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period, all documentation evidencing the *periodic* premium payment that was charged by the company for that policy.

7. With respect to each policy that was in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period, all documentation evidencing the *aggregate* amount of premium that was paid to the company for that policy.

8. All financial statements or reports of the company for each year that any of the policies were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany.

9. All reinsurance contracts that were in force during the specified time period and which relate, in whole or in part, to insurance policies issued by the company which policies were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period.

10. All documents evidencing the identity and, if available, the addresses of insurance brokers and brokerage companies involved in the marketing and sale of insurance policies, which policies were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period. Your response to this request may be in the form of lists or data compilations created for the purpose of responding to this subpoena. If it is in that form, the responsive information should be categorized by Country and by City.

11. All broker and brokerage files pertaining to the marketing and sale of insurance policies which policies were in force were in force [sic] in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period.

12. All documents evidencing the identity and, if available, the addresses of insurance agents and agencies involved in the marketing and sale of insurance policies, which policies were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period. Your response to this request may be in the form of lists or data compilations created for the purpose of responding to this subpoena. If it is in that form, the responsive information should be categorized by [Country] and by City.

13. All agent and agency files with respect to the marketing and sale of insurance policies, which policies were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period.

14. All correspondence dated between 1920 and present with policyholders and/or beneficiaries, with respect to policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time within the specified time period. The scope of this request extends to all individual items of correspondence and not merely to form letters or mailings that were sent to policyholders or beneficiaries on an undifferentiated basis.

15. All checks, drafts, and other indicia of payment issued by or on behalf of the company with respect to all policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period.

16. All receipts for or other proof of receipt of payment of policy proceeds with respect to all policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period.

17. All books, records, or other writings documenting the identity of the person or entity to whom or to which payment of policy proceeds was made with respect to all policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period.

18. All records of the company's legal department concerning claims or disputes concerning insurance policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period, other than such current records that constitute privileged attorney-client communication. For each item concerning

which you claim a privilege, you are to describe it by date, by name and capacity of sender and recipient, and state a general description of its form and subject matter.

19. All written records retention policies, programs or guidelines of the company that have been in force during the period 1920 until present.

20. A list of the names and, if available, the addresses of persons who were in charge of records retention and/or disposal for the company during the period 1920 until present.

21. All billings rendered to the company by outside vendors for services connected with the creation and implementation of programs and mechanisms to locate records, including policies and other evidence of coverage, necessary for the evaluation, processing, handling, and adjusting the insurance claims of policy beneficiaries, Holocaust victims, survivors, and/or their families.

22. All billings rendered to the company by outside vendors for services connected with the creation and implementation of programs and mechanisms for the evaluation, processing, handling, and adjusting insurance claims of policy beneficiaries, Holocaust victims, survivors, and/or their families.

23. All documents including, but not limited to, correspondence, memoranda, instructions, and guidelines issued by or on behalf of the company that pertain to the creation and implementation of programs and mechanisms to locate records necessary for the evaluation, processing, handling, and adjusting the insurance claims of policy beneficiaries, Holocaust victims, survivors, and/or their families.

24. All documents including, but not limited to, correspondence, memoranda, instructions, and guidelines for company employees or agents, that were prepared by or on behalf of the company, to be utilized by such employees or agents, in evaluating, processing, handling, and adjusting the insurance claims of policy beneficiaries, Holocaust victims, survivors, and/or their families.

25. All correspondence, forms, and other documents issued by the company in direct response to insurance claims received from or on behalf of policy beneficiaries, Holocaust victims, survivors, and/or their families. The scope of this request contemplates the production of each item pertaining to each claim, and not merely representative documents.

26. All documents including, but not limited to, correspondence, memoranda, and reports that were prepared by or on behalf of the company and which are directed to any government, governmental agency or entity, or archive, that pertain to the company's mechanisms and efforts to process, handle, or adjust the insurance claims of Holocaust victims, survivors, and/or their families. With respect to each item produced in response to this request, you are also requested to state the specific content of the inquiry that requested your response, or to produce the document that the Company received that triggered a response by it or on its behalf.

Please send all materials responsive to this subpoena to the attention of Luke S. Brown, Esq.

APPENDIX M

626.9543 Holocaust victims. –

(1) SHORT TITLE. – This section may be cited as the "Holocaust Victims Insurance Act."

(2) INTENT; PURPOSE. – It is the Legislature's intent that the potential and actual insurance claims of Holocaust victims and their heirs and beneficiaries be expeditiously identified and properly paid and that Holocaust victims and their families receive appropriate assistance in the filing and payment of their rightful claims.

(3) DEFINITIONS. – For the purpose of this section:

(a) "Department" means the Department of Insurance.

(b) "Holocaust victim" means any person who lost his or her life or property as a result of discriminatory laws, policies, or actions targeted against discrete groups of persons between 1920 and 1945, inclusive, in Nazi Germany, areas occupied by Nazi Germany, or countries allied with Nazi Germany.

(c) "Insurance policy" means, but is not limited to, life insurance, property insurance, or education policies.

(d) "Legal relationship" means any parent, subsidiary, or affiliated company with an insurer doing business in this state.

(e) "Proceeds" means the face or other payout value of policies and annuities plus reasonable interest to date of payments without diminution for wartime or immediate postwar currency devaluation.

(4) ASSISTANCE TO HOLOCAUST VICTIMS. – The department shall establish a toll-free telephone number,

available in appropriate languages, to assist any person seeking to recover proceeds from an insurance policy issued to a Holocaust victim.

(5) PROOF OF A CLAIM. – Any insurer doing business in this state, in receipt of a claim from a Holocaust victim or from a beneficiary, descendant, or heir of a Holocaust victim, shall:

(a) Diligently and expeditiously investigate all such claims.

(b) Allow such claimants to meet a reasonable, not unduly restrictive, standard of proof to substantiate a claim, pursuant to standards established by the department.

(c) Permit claims irrespective of any statute of limitations or notice requirements imposed by any insurance policy issued, provided the claim is submitted within 10 years after the effective date of this section.

(6) STATUTE OF LIMITATIONS. – Notwithstanding any law or agreement among the parties to an insurance policy to the contrary, any action brought by Holocaust victims or by a beneficiary, heir, or a descendant of a Holocaust victim seeking proceeds of an insurance policy issued or in effect between 1920 and 1945, inclusive, shall not be dismissed for failure to comply with the applicable statute of limitations or laches provided the action is commenced within 10 years after the effective date of this section.

(7) REPORTS FROM INSURERS. – Any insurer doing business in this state shall have an affirmative duty to ascertain to the extent possible and report to the department within 90 days after the effective date of this section

and annually thereafter all efforts made and results of such efforts to ascertain:

(a) Any legal relationship with an international insurer that issued an insurance policy to a Holocaust victim between 1920 and 1945, inclusive.

(b) The number and total value of such policies.

(c) Any claim filed by a Holocaust victim, his or her beneficiary, heir, or descendant that has been paid, denied payment, or is pending.

(d) Attempts made by the insurer to locate the beneficiaries of any such policies for which no claim of benefits has been made.

(e) An explanation of any denial or pending payment of a claim to a Holocaust victim, his or her beneficiary, heir, or descendant.

(8) REPORTS TO THE LEGISLATURE. – The department shall report to the Legislature 1 year after the effective date of this section and annually thereafter:

(a) The number of insurers doing business in this state which have a legal relationship with an international insurer that could have issued a policy to a Holocaust victim between 1920 and 1945, inclusive.

(b) A list of all claims paid, denied, or pending to a Holocaust victim, his or her beneficiary, heir, or descendant.

(c) A summary of the length of time for the processing and disposition of a claim by the insurer.

(9) PENALTIES. – In addition to any other penalty provided under this chapter, any insurer or person who violates the provisions of this section is subject to an administrative penalty of $1,000 per day for each day such violation continues.

(10) PRIVATE RIGHT OF ACTION. – An action to recover damages caused by a violation of this section must be commenced within 5 years after the cause of action has accrued. Any person who shall sustain damages by the reason of a violation of this section shall recover threefold the actual damages sustained thereby, as well as costs not exceeding $50,000, and reasonable attorneys' fees. At or before the commencement of any civil action by a party, notice thereof shall be served upon the department.

(11) RULES. – The department, by rule, shall provide for the implementation of the provisions of this section by establishing procedures and related forms for facilitating, monitoring, and verifying compliance with this section and for the establishment of a restitution program for Holocaust victims, survivors, and their heirs and beneficiaries.

(12) SEVERABILITY. – If any provision of this section or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are declared severable.

APPENDIX N

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: ASSICURAZIONI GENERALI S.p.A. HOLOCAUST INSURANCE LITIGATION	MDL 1374 M 21-89 (MBM)

MEMORANDUM OF LAW IN SUPPORT OF ASSICURAZIONI GENERALI S.P.A.'S MOTION TO DISMISS, STRIKE, AND/OR FOR JUDGMENT ON ALL PLAINTIFFS' CLAIMS, ON CHOICE OF LAW AND RELATED GROUNDS

* * *

The Ninth Circuit's decision in *Gerling Global Reinsurance Corp. v. Low*, 296 F.3d 832 (9th Cir.), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Nov. 8, 2002) (No. 02-733), is not on point and does not assist Plaintiffs. At issue in *Low* was the constitutionality of the reporting provisions of California's Holocaust Victims Insurance Relief Act ("HVIRA"), Cal. Ins. Code §§ 13800 *et seq.*, which as the court found important, is a separate enactment from the HVIA. In upholding the HVIRA against constitutional challenge, the court took pains to point out that it did not apply California law to foreign insurance contracts, but merely sought information about such policies. *Id.* at 846. The Ninth Circuit sidestepped the import of *Gallagher* by not addressing the constitutionality of the HVIA and expressly reserving judgment on the constitutionality of that statute for another day. *Id.* at 837. Indeed, in distinguishing *Gallagher*, the Ninth Circuit reasoned that, unlike the HVIRA,

the Florida statute, like the HVIA, contained provisions that directly sought to regulate foreign transactions:

> [T]he only statute at issue in this appeal is a reporting statute. Proposed challenges to other laws that alter the statute of limitations and provide a forum for substantive claims were dismissed for lack of standing. By contrast, the statute considered in *Gallagher* contained both disclosure and substantive elements. Although the Eleventh Circuit based its ruling on only the disclosure provisions, the difference in the structure of the two statutes still is meaningful.

Id. at 839. Thus, the Ninth Circuit's decision in *Low* has no application in this case, where *Gallagher* controls.

* * *

CONCLUSION

For the foregoing reasons, Generali respectfully requests that the Court grant its motion and dismiss Plaintiffs' claims in their entirety.

Dated: New York, New York
November 15, 2002

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Nos. 02-722 and 02-733

Supreme Court, U.S.
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In The Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, *et al.*,
Petitioners,

v.

HARRY LOW, in his capacity as Commissioner of Insurance for the State of California,
Respondent.

GERLING GLOBAL REINSURANCE CORP. OF AMERICA, *et al.*,
Petitioners,

v.

HARRY LOW, in his capacity as Commissioner of Insurance for the State of California,
Respondent.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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SUPPLEMENTAL BRIEF

Respondent Harry W. Low, in his capacity as the Commissioner of Insurance of the State of California (the "Commissioner") respectfully submits this supplemental brief in response to the Brief for the United States as Amicus Curiae Supporting Petitioners (Nos. 02-722 and 02-733) (the "U.S. Brief"). Supreme Court Rule 15.8. *See Hagen v. Utah*, 510 U.S. 399, 410 (1994).

I. THE U.S. BRIEF CONFIRMS THAT THE HVIRA POSES NO TANGIBLE THREAT TO U.S. FOREIGN AFFAIRS

Much of petitioners' argument is premised upon dramatic overstatement of the effect of California's Holocaust Victim Insurance Relief Act, Cal. Ins. Code §§ 13800-13807 (the "HVIRA"), upon U.S. foreign affairs. As pointed out in the Commissioner's briefs in opposition, petitioners seek to manufacture a foreign policy crisis out of pure rhetoric, without a single concrete example of how the HVIRA has affected or may affect U.S. foreign affairs. The Commissioner has noted that all of the U.S. diplomatic initiatives mentioned by petitioners (the German Foundation Agreement, the International Commission on Holocaust Era Insurance Claims (ICHEIC) and various other related agreements) are proceeding without any disruption or material threat of disruption from the HVIRA. Brief in Opposition to the AIA Petition (No. 02-722) at 15-17.

The U.S. Brief confirms the HVIRA's lack of foreign policy effects. The U.S. Brief does not identify any tangible harm to foreign affairs that might be posed by the HVIRA (nor do the related amicus briefs of the governments of Switzerland and Germany). At most, the U.S. Brief offers

conclusory and speculative suggestions that the HVIRA "threatens to impair" United States policy, that it "may impede the implementation and operation" of various agreements, and that it is "potentially disruptive and counterproductive." U.S. Brief at 17-18. But the U.S. Brief fails to suggest any way in which the HVIRA has caused, or even may cause, any disruption to the ongoing Holocaust settlement initiatives or any material aspect of U.S. diplomacy.

The only matter beyond mere speculation that the U.S. Brief suggests is that Germany and Switzerland have lodged diplomatic protests against various state laws including the HVIRA. But it is not unusual for state laws affecting foreign private companies to be protested by those companies' home governments, and neither this Court nor any other court has held that such protests alone are constitutionally significant effects upon foreign affairs. *See Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994); *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3rd Cir. 1990).

II. THE U.S. BRIEF MISSTATES THE *BARCLAYS* CASE AND IMPLIES A SWEEPING RULE OF EXCLUSIVE FEDERAL AUTHORITY THAT IS UNSUPPORTED BY LAW

Recognizing that the HVIRA has not impaired any diplomatic initiative and does not criticize any foreign government, the U.S. Brief nonetheless suggests that the HVIRA impermissibly "intrudes" in some vague way short of actual interference into a sphere of exclusive federal authority. As the Commissioner discussed in his Brief in Opposition to the AIA Petition (No. 02-722) (pages 17-18),

under *Zschernig v. Miller*, 389 U.S. 429 (1968), a state intrudes upon the federal government's foreign affairs power if the state criticizes, insults or shows hostility toward a foreign government. But the HVIRA does not do any of these things. The HVIRA is not even directed to foreign governments – it is merely a regulation of the local, private business of insurance in California.

Moreover, state regulation of the business of insurance, even when it involves multinational actors, is not part of a sphere of federal exclusivity. Rather, insurance regulation has long been a usual state activity, as recognized by Congress in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2000). As this Court has held, such a traditional state regulatory activity remains appropriate even if it has effects upon foreign private parties. *Barclays*, 512 U.S. at 328-30; *Clark v. Allen*, 331 U.S. 503 (1947). Indeed, the principal difference between *Clark* and *Zschernig* (cases that involved substantially similar statutes) was that the statute struck down in *Zschernig* was being applied in a way that criticized and insulted foreign governments, whereas the statute upheld in *Clark* adversely affected foreign private parties but was not implemented in a way that criticized foreign governments. *See Zschernig*, 389 U.S. at 433-34.

The U.S. Brief suggests that, even apart from *Zschernig*, the fact that U.S. diplomatic activity has occurred or is ongoing with respect to the resolution of Holocaust-era insurance claims is sufficient to oust state regulatory authority that touches in some respect on that subject matter. The U.S. Brief contains no authority for such a limitless claim of federal authority and there is none. No case has ever held that the existence of U.S. diplomatic efforts itself overrides state regulatory authority, and at

least two important cases are squarely to the contrary. In both *Barclays*, 512 U.S. 298 (1994), and *Trojan Technologies*, 916 F.2d 903 (3rd Cir. 1990), the Executive was involved in diplomatic activities relating to the state laws at issue and foreign governments had strongly protested the state activities. Yet the laws in both cases were upheld on the ground that no preemptive act of Congress (or applicable treaty) overrode the state's authority.[1] In any event, the United States has expressly acknowledged here that the German Foundation Agreement is not itself preemptive of laws such as the HVIRA. *See* Resp. App. at 48-49.

The U.S. Brief misstates the importance and effect of the *Barclays* case. The brief argues that the Court of Appeals below erred in relying on *Barclays*, because "*Barclays* addressed an unusual situation in which Congress and the Executive had taken divergent positions." U.S. Brief at 19. However, as the court below pointed out, the positions of the Executive and Congress are no less divergent in the present case. Based on a thorough review of the relevant congressional legislation,[2] the court below concluded that Congress had implicitly approved state

---

[1] This Court granted certiorari in *Barclays* based on, *inter alia*, dormant Commerce Clause and *Zschernig* challenges to a state statute. This Court decided the case under the dormant Commerce Clause and upheld the statute without mentioning *Zschernig*, thus implicitly rejecting the *Zschernig* challenge. In *Trojan Technologies*, the Third Circuit specifically considered and rejected the *Zschernig* challenge.

[2] In particular, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 and the U.S. Holocaust Assets Commission Act of 1998, Pub. L. 105-186, 112 Stat. 611, as amended Pub. L. 106-155, § 2, 113 Stat. 1740 (1999) (codified at 22 U.S.C. § 1621 note) (2000).

laws such as the HVIRA. Congress plainly has not adopted any legislation opposing such state activities or otherwise indicated any concern about them. In *Barclays*, Congress had not adopted any legislation affirmatively supporting the challenged law; it had simply declined to adopt an Executive branch recommendation to enact legislation restricting the states. This Court held that it would not invalidate the state law, despite its effects on foreign businesses and protests by foreign governments, in the absence of "specific indications of congressional intent to bar the state statute here challenged." *Barclays*, 512 U.S. at 324.[3]

In sum, the U.S. Brief appears to rest upon the unsupported assertion of a sweeping Executive power to override legitimate state regulatory authority through past or current diplomatic activity. Such far-reaching authority would invalidate many state regulatory regimes whose constitutionality has never before been doubted. State regulatory authority, of course, is displaced by actions of Congress, which is the voice of the nation in foreign commerce, *see Barclays*, 512 U.S. at 329-330, and may not overstep the limits established in *Zschernig*, 389 U.S. 429, by criticizing or insulting foreign governments. But the HVIRA does not fall into either of these categories. Accordingly, it is no more constitutionally suspect than the state statute upheld in *Barclays*, which regulated private

[3] In contrast, in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), upon which the U.S. Brief primarily relies, Congress had adopted legislation establishing a national policy that displaced the states. Thus, the "specific indications of congressional intent" from *Barclays* were plain and this Court accordingly invalidated the statute.

business, had been protested more vigorously by foreign governments, and had received less support from Congress than has the HVIRA.

Respectfully submitted,

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Supreme Court U.S.
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No. 02-733

IN THE

Supreme Court of the United States

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. — U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL LIFE INSURANCE COMPANY; GERLING AMERICA INSURANCE COMPANY; and CONSTITUTION INSURANCE COMPANY,

Petitioners,

v.

HARRY W. LOW, in his capacity as the COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' Rule 29.6 Statement was set forth at page *iii* of their Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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2001 California Preliminary P&C Market Share Report located at the California Department of Insurance Website at http://www.insurance.ca.gov/RRD/RSU/MktShr2001/MktShr2001.htm 8

In opposing the petition for writ of certiorari of the Gerling Petitioners, the Respondent asks the Court to ignore the record, ignore the language of the California statute at issue, and ignore the legislative history of that statute. As he did in the courts below, the Respondent has recast the HVIRA as a benign "reporting statute"; a "state regulation of in-state insurance companies." Opp. to Gerling at 14.[1] In reality, as applied to the Gerling Petitioners, the HVIRA *exclusively* seeks information maintained by out-of-state companies regarding out-of-state transactions entered into by out-of-state parties. The Respondent's post-litigation recharacterization of the HVIRA can neither be reconciled with the legislation itself nor with his own pre-litigation conduct.

The Gerling Petitioners are North American insurers and reinsurers, none of which issued a single insurance policy in Europe prior to 1945. ER 616. The district court has concluded that the Gerling Petitioners do not have "possession, custody or control" of the information demanded by the HVIRA. App., *infra*, 47a. Nevertheless, the Ninth Circuit has, through its decisions, authorized the Respondent to suspend the Gerling Petitioners' long-existing California licenses for their failure to do the impossible.

A. The HVIRA Violates Due Process Limitations On State Power

The HVIRA represents an attempt by the State of California to project its regulatory regime far beyond its borders. In its application, the HVIRA constitutes a thinly-veiled attempt to supplant the controlling law of other jurisdictions. The record is clear, there is simply no way for the Gerling Petitioners to

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1. References to the Respondent's Brief in Opposition to the Petition for a Writ of Certiorari of the Gerling Petitioners and to the AIA's Petition for a Writ of Certiorari will be referred to as "Opp. to Gerling" and "Opp. to AIA", respectively. References to the Appendix ("App.") and Lodging ("Lodg.") are to those filed in conjunction with the Petition for Writ of Certiorari of the Gerling Petitioners.

comply with the HVIRA unless their German affiliates violate German law. The Constitution clearly does not afford the states such unbridled authority.

1. The HVIRA Constitutes Impermissible Extra-territorial Legislation

The Respondent's primary defense to the constitutionality of the HVIRA is his claim that "the HVIRA is a reporting statute that only seeks information about business practices of companies doing business in California and their affiliates." Opp. to Gerling at 18.[2] This post-litigation justification conflicts sharply with the rationale that the Respondent offered the California legislature prior to enactment: "[t]he Department [of Insurance] believes this bill will be of significant assistance to the Department in its endeavor to ensure full payment of claims to Holocaust survivors and their descendants." Reply App.[3], *infra*, 5a. The Respondent's current argument also conflicts with the language of the HVIRA itself; a statute which demands production of information regarding all insurance policies issued in Europe between 1920 and 1945. Cal. Ins. Code § 13804(a).

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2. The statutes the Respondent attempts to analogize do not support his assertion that states routinely require the type of information demanded by the HVIRA. Opp. to Gerling at 27; Opp. to AIA at 6. Contrary to the Commissioner's selective representations, ***all*** of those statutes require information from foreign companies *under the control* of California insurance companies or where there is a significant nexus between the California company and its foreign affiliate. *See* Cal. Ins. Code §§ 699.5, 717, 1215-1215.16; Cal. Fin. Code §§ 5800-5811, 10000-10009. In contrast, the HVIRA requires California insurers to obtain (and disclose) European insurance information from distant "related" companies over which they have no control and which may not even be in the same corporate "family." Cal. Ins. Code § 13802(b).

3. References to "Reply App." are to the documents appended to the Gerling Petitioners' Reply Brief.

Apparently unable or unwilling to defend the statute as enacted by the California legislature, the Respondent offers the Court (as he did the Ninth Circuit) a distorted version of the record. For example, he claims that the issue of whether the Gerling Petitioners have "'control' of the information sought and whether foreign law bars disclosure is disputed." Opp. to Gerling at 27. In fact, the district court already concluded that the Gerling Petitioners do not have control over the information required by the HVIRA.[4] App., *infra*, 47a. Similarly, the German government has repeatedly concluded that "compliance by German companies with the HVIRA would cause them to violate German laws and thereby become subject to civil and criminal penalties." Dec. 12, 2002 *Amicus* brf. of FRG at 4.[5]

Particularly revealing is the Respondent's inexplicable criticism of the Gerling Petitioners' "elaborate citations to the record." Opp. to Gerling at 24, n.16. This comment betrays the Respondent's clear insecurity with the record.[6] He simply cannot defend either the statute as written or the record developed below.

To support his new characterization of the HVIRA, Respondent takes extraordinary liberties in providing the Court with a revisionist history of the origins and purpose of the statute

---

4. The district court in *Gerling Global Reinsurance Corp. of America, et al. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001) made an identical factual determination.

5. *See also* ER 846; SER 1248; Mar. 15, 2002 *Amicus* brf. of FRG at 6; Aug. 5, 2002 *Amicus* brf. of FRG at 9-10.

6. The record could not be more clear that the State of California views the HVIRA as a tool to effect the conduct of European insurers. *See, e.g.*, ER 1111 (Department of Insurance senior counsel stated that HVIRA "clearly goes beyond the California licensed company."); ER 1113-1115 (Respondent demanded that representatives of German companies with no U.S. presence be made available to discuss compliance with HVIRA); SER 901-908 (California Treasurer issued a written demand to a German affiliate of the Gerling Petitioners that it should comply with HVIRA to "eliminate" litigation).

(legislation which he actively supported). Specifically, the Respondent now seeks to distance the HVIRA from its companion statute which purports to empower California courts to entertain Holocaust-related litigation. Cal. Civ. Pro. Code § 354.5.

In fact, the Respondent is fully aware that these provisions were included in the same legislation as the HVIRA. AB 600 (the "Knox Bill") Lodg., *infra*, L-36-L-41. According to the California legislature, "[t]he author introduced this bill in order to ensure that Holocaust victims or their heirs can take direct action on their own behalf with regard to insurance policies and claims." Reply App., *infra*, 4a.

The Knox Bill (and the resulting HVIRA) has nothing to do with an insurance company's fitness to write insurance in California. Nowhere in the Knox Bill's legislative history does the legislature even suggest an intent to "inform[] California's residents about the character of the family of companies from which they might purchase insurance." Opp. to Gerling at 6.

The HVIRA had a single purpose from the start: the payment of European insurance claims pursuant to California-imposed standards.[7] It attempts to effect conduct far beyond the borders of the state. As such, it constitutes impermissible extraterritorial legislation.

2. The Ninth Circuit's Decision Directly Conflicts With The Eleventh Circuit's Decision in *Gallagher*

In attempting to distinguish the Eleventh Circuit's decision in *Gallagher*, the Respondent relies heavily on purported differences between the HVIRA and the Florida Holocaust statute. These distinctions are illusory. Aside from the fact that

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7. The California Senate Floor Analysis of the Knox Bill contains a nine paragraph summary of this legislation. Paragraph eight of this document affirmatively states that the bill "[w]ould authorize legal actions on Holocaust insurance claims arising out of insurance policies purchased or in effect in Europe before 1945." Reply App., *infra*, 4a.

there is a counterpart in the Knox Bill for virtually every provision contained in the Florida statute, the Eleventh Circuit specifically stated that it was dealing *solely* with the reporting provisions of the Florida statute. *Gallagher*, 267 F.3d at 1234. Thus, the statutory provisions reviewed by the Eleventh Circuit are virtually identical to those contained in the HVIRA.

The Respondent attempts to distinguish *Gallagher* by arguing that the Florida Commissioner tried to enforce the Florida statute against European insurers by issuing subpoenas to the Gerling Petitioners. The Respondent argues that these subpoenas represented an attempt by Florida "to enforce its law against European insurers . . . whereas California's law is addressed only to California-licensed companies." Opp. to Gerling 23. However, the HVIRA is little more than the functional equivalent of the Florida subpoenas. To paraphrase the Respondent, the HVIRA (like the Florida subpoenas) is only "nominally directed" to California companies. By its very terms, the HVIRA (like the subpoenas) defines California insurers "as *including* foreign affiliates." Cal. Ins. Code § 13802(b). Like the Florida subpoenas, the HVIRA commands "foreign affiliates to provide the records" it seeks. Opp. to Gerling 23-34. California attempts to accomplish by statute that which Florida sought by subpoena – the regulation of companies and transactions with no connection to the state.

The Respondent also claims that the Florida statute was different because it intended to compel payment of claims and created private rights of action against Florida insurers. In fact, the Eleventh Circuit dealt *solely* with the reporting provisions of the Florida statute. Therefore, the statutory provisions that the court struck down in *Gallagher* are identical to the HVIRA. *Gallagher*, 267 F.3d at 1234. Moreover, the legislation creating the HVIRA is in all material respects identical to the Florida statute. Lodg., *infra*, L-29-L-35.

Finally, the Respondent claims that the California and Florida statutes are "supported by materially different state

interests." Opp. to Gerling 24. However, contrary to the Respondent's litigation-manufactured justifications, California enacted the HVIRA for the same reasons Florida did – as part of an attempt to resolve European insurance claims. *See* Cal. Ins. Code §§ 13801(e)-(f); App. 83a; Reply App., *infra*, 4a-5a.

As a result of the conflicting decisions of the Ninth and Eleventh Circuits, the Gerling Petitioners face divergent obligations in Florida and California. This conflict warrants further review by this Court.

3. The HVIRA Denies The Gerling Petitioners Their Right To A Meaningful Hearing

Contrary to the Respondent's assertions, the right to a meaningful hearing implicates *procedural* due process concerns. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (Once it is determined that the interest at stake is a protected property interest, the sole question that remains is what process is due.); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541-42 (1985).[8] "The opportunity to present reasons, . . . why proposed action should not be taken is a fundamental due process requirement." *Cleveland Bd. of Educ.*, 470 U.S. at 546. It is the ability to present reasons why a proposed action should or should not be taken that is key to a meaningful hearing before license suspension. In his opposition, the Respondent never addresses this issue. Instead, he sidesteps it by casting it as a substantive issue – whether the Gerling Petitioners are allowed to even raise any defenses.

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8. The Respondent equates the granting of a license with the suspension of an existing business license. Opp. to Gerling at 29. However, this Court has already recognized that "[t]here is a crucial difference between being deprived of a [right] one has . . . and being denied a constitutional [right] that one desires." *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 5 (1970); *see also Bell v. Burson*, 402 U.S. at 539 ("Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood."). The HVIRA only applies to existing license holders. Cal. Ins. Code §§ 13804(a), 13806.

By mandating license suspension without providing for any type of hearing, the HVIRA violates the Gerling Petitioners' procedural due process rights. Even if afforded a hearing, the Gerling Petitioners will not have the right to demonstrate that they simply cannot comply with the HVIRA's requirements. A hearing with such a predetermined outcome would clearly not satisfy the meaningful hearing requirement embodied in the Due Process Clause.

4. As Applied To The Gerling Petitioners, The HVIRA Does Not Reflect Any Legitimate State Regulatory Interests

In attempting to justify the HVIRA on substantive due process grounds, the Respondent has identified a number of purported state regulatory interests. Opp. to Gerling 6. He claims that these interests provide a "rational basis" for the HVIRA and empower California to legislate away legitimate defenses to compliance. Opp. to Gerling 29. At least as applied to the Gerling Petitioners, none of these purported interests is supported by the record.

For example, the Respondent claims that the HVIRA serves to advance the state's interests by "protecting California residents from insurers that refuse to provide critical information." Opp. to Gerling 6. However, as the district court concluded, the Gerling Petitioners do not have possession of the information demanded by the HVIRA since none of them issued policies in Europe prior to 1945. ER 616. In addition, the district court concluded that the Gerling Petitioners do not have control over the records of their German affiliates. App., *infra*, 47a. Further, these affiliates are prohibited by German law from making the wholesale public disclosure of information required by the HVIRA.

The Respondent further claims that the HVIRA is protecting California residents from companies that refuse to "pay valid insurance claims." Opp. to Gerling 6. Aside from the fact that the Gerling Petitioners did not issue these policies and were

largely founded after the Second World War, there is absolutely no evidence in the record that any company "related" to the Gerling Petitioners refused to pay valid claims under controlling German law. Implicit in the Respondent's current argument is an apparent determination by the State of California in 1999 that German law regarding the payment of Holocaust-era claims is inadequate.

The final purported state interest the Respondent asserts is that the HVIRA informs "California residents about the character of the family of companies from which they might purchase insurance." Opp. to Gerling 6. The Respondent does not attempt to explain what relevance the claims-paying practices of a distant corporate affiliate operating under foreign law has to the "character" of the Gerling Petitioners. Moreover, the scope of information sought by the HVIRA goes far beyond the corporate "family" of the California companies. Cal. Ins. Code § 13802(b).[9]

B. The HVIRA Interferes With Foreign Affairs

The Respondent defends the HVIRA as "a reporting statute that applies only to companies doing business in California." Opp. to Gerling 20. As such, he argues that the HVIRA is "not likely to have adverse effects on U.S. foreign policy."

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9. The Respondent's claims that the HVIRA will ease the burden on the State's fisc rings hollow. First, there is no evidence to support such a claim. Second, aside from the cost to the State in administering the HVIRA, the entire California insurance market, the seventh largest market in the world, would be drastically affected as enforcement would effectively drive all companies related to European insurers out of the State. These companies underwrite at least twenty percent (20%) of all the property and casualty insurance policies issued in California. *See* 2001 California Preliminary P&C Market Share Report located at the California Department of Insurance Website at http://www.insurance.ca.gov/RRD/RSU/MktShr2001/MktShr2001.htm (listing property and casualty market share of the insurance groups which have European affiliates); *see also* ER 223; ER 908; ER 626.

Opp. to Gerling 16. Furthermore, he claims that "the HVIRA does not criticize any foreign government." Opp. to AIA 21.

As justification for enactment of the statute, however, he claims that "[f]or more than 55 years, Holocaust survivors have been stonewalled by insurance companies from which they have sought information." Opp. to Gerling 3. He alleges "decades-long frustration of Holocaust survivors." *Id.* at 5. The Respondent goes on to suggest that he has a better understanding of German law than does the German government. *Id.* at 13.

These justifications conflict sharply with the Respondent's current arguments. They reflect California's apparent dissatisfaction with 55 years of restitution and compensation payments of the Federal Republic of Germany amounting to roughly $100 billion.[10] Dec. 12, 2002 *Amicus* brf. by FRG at 6. They reflect California's disapproval of 55 years of U.S. foreign policy initiatives aimed at "achieving compensation for the victims of Nazism." Dec. 2002 *Amicus* brf. of U.S. at 2. They reflect California's criticism of European (and specifically German) data protection laws which prohibit the unauthorized disclosure of personal information as required by the HVIRA. Dec. 12, 2002 *Amicus* brf. of FRG at 10.

The HVIRA is an attempt by the State of California to impose its own "solution" to Holocaust-era claims despite the Federal Republic of Germany's 55 years of reparations efforts and the recently negotiated Executive Agreement. *See* Cal. Ins. Code §§ 13801(e)-(f); Reply App., *infra*, 1a-5a. The HVIRA is a clear and unmistakable criticism of German domestic law on such issues as data protection, currency valuation, insurance regulation and Holocaust reparations and compensation. In the view of the German government, "[t]he decisions of the Ninth

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10. Which include payment of "over two million claims for assets that could not be returned, including virtually all insurance policies." Dec 12, 2002 *Amicus* brf. of FRG at 6.

Circuit affront German sovereignty every day they remain unreviewed and uncorrected." Dec. 12, 2002 *Amicus* brf. of FRG at 13.

As reflected by the *amicus* filings of the United States, Germany and Switzerland, the HVIRA constitutes impermissible interference with the federal government's conduct of foreign affairs. *Zschernig v. Miller*, 389 U.S. 429 (1968).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX — SENATE COMMITTEE ON INSURANCE

SENATE COMMITTEE ON INSURANCE
Senator Jackie Speier, Chair

AB 600 (Knox and Villaraigosa) Hearing Date: June 30,

As Amended: June 17, 1999
Fiscal: Yes
Urgency: Yes

Assembly Insurance Committee - 4/14/99 - (12-0)
Assembly Floor - 6/3/99 - (79-0)

SUMMARY

Would require the Insurance Commissioner to establish and maintain the Holocaust Insurance Registry, would require insurers to provide specified information regarding insurance policies to be included in the registry, would provide public access to the registry in connection with claims litigation, and would provide penalties for an insurers failure to comply with reporting requirements.

DIGEST

Existing law

1. Provides for the Insurance Commissioner's regulation of insurers licensed and transacting the business of insurance in this state.

Appendix

2. Authorizes the Insurance Commissioner to suspend or revoke the certificate of authority of an insure for failure to comply with laws governing insurance regulation in this state.

3. Requires the Department of Insurance to conduct research and investigation into insurance policies, unpaid insurance claims and related matters of victims of the Holocaust.

4. Requires the Insurance Commissioner to suspend the Certificate of Authority of an insurer if the insurer or any affiliate of the insurer has failed to pay any valid claim of Holocaust survivors, until the claim is paid by the insurer or its affiliate.

5. Authorizes legal actions on Holocaust insurance claims arising out of insurance policies issued in Europe between 1920 and 1945.

This bill

1. Would require the Insurance Commissioner to establish and maintain a registry accessible to the public of information related to the insurance policies of Holocaust victims.

2. Would require any insurer doing business in California that sold insurance in Europe that was effected between 1920 and 1945, whether directly or through a related company, to file with the Insurance Commissioner specific information related to the policies sold.

Appendix

3. Would require each insurer subject to the provisions of the bill to certify to the appropriate following facts regarding insurance policies:

   a. That the proceeds of the policies have been paid to the designated beneficiaries or heirs;

   b. That where beneficiaries or heirs could not be located, that the proceeds have been distributed to Holocaust survivors or to qualified charitable nonprofit organizations for the purpose of assisting Holocaust survivors;

   c. That a court has certified a plan for the distribution of the proceeds; or

   d. That proceeds of a designated amount have not been distributed.

4. Would establish a misdemeanor penalty for an insurer's knowingly false certification.

5. Would establish a civil penalty of up to $5,000 for each instance an insurer knowingly files false information related to the reporting requirements of the bill.

6. Would require the Insurance Commissioner to suspend the certificate of Authority of an insurer that fails to comply with the reporting requirements of the bill by the 210th day after the effective date of the requirements.

Appendix

7. Would require the Insurance Commissioner to adopt emergency regulations to implement the measure within 90 days of the effective date of the bill.

8. Would authorize legal actions on Holocaust insurance claims arising out of insurance policies purchased or in effect in Europe before 1945.

9. Would provide for the adoption of the above provisions on an urgency basis.

COMMENTS

1. *Purpose of the bill.* The author introduced this bill in order to ensure that Holocaust victims or their heirs can take direct action on their own behalf with regard to insurance policies and claims. The bill sets up a registry of information, without which the only remaining evidence of insurance policies purchased prior to the end of W.W.II would be in the hands of the insurance companies or Department of Insurance. The bill will help resolve this outstanding issue by ensuring that any existing information on insurance policies purchased prior to the end of W.W.II will be available to those individuals who need that information in order to protect their rightful claims to reimbursement from insurers.

2. *Background.* The issue of insurance claims for Holocaust survivors came to light in 1997 through a class action suit filed in New York. The problem of unpaid insurance claims had been discovered in the course of researching Holocaust survivor claims to European bank

deposits. DOI estimates there are 50,000 to 100,000 Holocaust survivors in the United States. California has the second largest number, ranging from 6,300 to 19,000. In 1998, two bills were introduced relating to the recovery of proceeds from unpaid Holocaust victim claims. The Governor vetoed AB 1715 (Knox), which contained similar provisions to this bill. The Governor signed SB 1530 (Hayden), Chapter 963, which required the Department of Insurance to develop a plan to investigate and recover unpaid Holocaust victim insurance claims and provided for the suspension of the certificate of authority of insurers failing to pay valid claims.

3. Support. Supporters argue that this bill is an important measure to assist Holocaust survivors and their heirs to obtain their rightful compensation. The Department of Insurance notes that insurance companies, that have for over 50 years refused to pay Jewish and other policyholders, should be held accountable, open their books and pay legitimate claims. The Department believes this bill will be of significant assistance to the Department in its endeavor to ensure full payment of claims to Holocaust survivors and their descendants. The Consumer Federation of California believes this bill is urgently needed because of the age of the survivors and that justice demands an affirmative duty to resolve this matter in a timely fashion.

   The Los Angeles County Bar Association supports the purposes of the bill, such as providing additional remedies to individuals with unpaid claims, making

information available to claimants, and resolving important questions about past processing of claims. The Association however is concerned about the following "ambiguities and uncertainties": 1) Broad definitions of "related company" and "Holocaust victim" that might impose liability on insurers with no true relationship to the Holocaust, for claims of persons persecuted in areas other than occupied Europe; 2) The filing requirements for policies unrelated to Holocaust victims; and 3) Whether companies can reasonably comply with the reporting requirements.

4. *Opposition.* The Alliance of American Insurers opposes this bill because it places an unfair burden on subsidiary carriers owned by overseas companies and is unnecessary because existing law already created the program to help Holocaust victims.

POSITIONS

Support

Beverly Hills Bar Association
Department of Insurance
California Alliance for Consumer Protection
City Council of the City of West Hollywood
Consumer Federation of California
Jewish Community Relations Committee of the Jewish Federation of Greater Los Angeles (Sponsor)
Jewish Public Affairs Committee of California
Johan Klehs, Chair, State Board of Equalization
Los Angeles County Bar Association (with concerns)
Philip Angelides, State Treasurer

Appendix

Oppose

Alliance of American Insurers

Consultant: Jerry Whitfield

Supreme Court, U.S.
FILED

FEB 24 2003

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(16) (9)

Nos. 02-722, 02-733

IN THE

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, *et al.*,
Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,
Respondent.

GERLING GLOBAL REINSURANCE CORP., *et al.*,
Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF GOVERNMENT OF SWITZERLAND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF GOVERNMENT OF SWITZERLAND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37 of the Rules of this Court, the Government of Switzerland respectfully submits this brief as

amicus curiae to urge reversal of the judgment below.[1] Petitioners and respondent consented to the filing of this brief.

INTEREST OF THE AMICUS CURIAE

Arising simultaneously with major reevaluations by many countries of the conduct of their governments, industries, and general populations during the World War II era, the issue of payments by corporations to resolve outstanding World War II era claims has become prominent in recent years. The role of civil lawsuits in the United States courts in this process has itself been highly controversial.

Switzerland was the first country to deal in a comprehensive manner with the issue of corporate payments to resolve World War II era claims. On August 9, 2000, the U.S. District Court for the Eastern District of New York formally approved a settlement agreement among Swiss companies, class action plaintiffs, and the World Jewish Restitution Organization. The settlement agreement, which includes payment to the plaintiffs of $1.25 billion, by its terms provides for complete legal and material resolution of Holocaust-related issues for all of Switzerland, with the exception of three Swiss insurance companies. Meanwhile, the Government of Switzerland has endorsed the work of the International Commission on Holocaust Era Insurance Claims, an international organization formed to address unpaid insurance claims.

The Government of Switzerland has grave concerns that the decision of the U.S. Court of Appeals for the Ninth Circuit, by encouraging the State of California and other States to pursue their own unilateral agendas, may undermine the extensive efforts that have been made by Swiss industry,

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[1] Counsel for the Government of Switzerland prepared this brief in its entirety, and no person or entity other than the Government of Switzerland and its counsel made a monetary contribution to its preparation or submission.

major Jewish organizations, and the Swiss and United States governments to achieve a comprehensive resolution of a difficult and complex international issue. In addition, the Government of Switzerland has a vital interest in the preservation of the integrity of the laws and legal system of Switzerland, and believes that the decision of the Ninth Circuit must be reversed to prevent the California statute from requiring the production of confidential information from Switzerland in a manner inconsistent with Swiss law and sovereignty.

Accordingly, the Government of Switzerland submits this brief to explain its views on why the California statute, if applied, would interfere with Swiss-United States relations.

SUMMARY OF ARGUMENT

The Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), Cal. Ins. Code §§13900-13807, is a California statute that would impose onerous reporting burdens on foreign companies, including Swiss companies, relating to records of World War II era transactions that took place over fifty years ago in foreign countries with persons who were not United States citizens or present in the United States at the time of those transactions. The purpose of the statute is to facilitate the initiation of civil lawsuits in California against foreign companies.

On February 7, 2001, the U.S. Court of Appeals for the Ninth Circuit reversed the holdings of the U.S. District Court for the Eastern District of California and held that the HVIRA is consistent with the Foreign Commerce Clause and does not infringe upon the foreign affairs power of the Executive Branch. On remand, the district court issued a permanent injunction enjoining enforcement of the HRIVA on the grounds that mandating license suspension for non-performance of impossible tasks deprived the petitioners of a protected property interest without due process of law. On July 15, 2002, the Ninth Circuit again reversed the district court, distinguished the decision of the U.S. Court of Appeals

for the Eleventh Circuit with respect to a similar statute in *Gerling Global Reins. Corp. v. Gallagher*, and upheld the HRIVA against the petitioners' constitutional claims.

Contrary to the Ninth Circuit's holdings, the HVIRA, if applied, will have a significant effect on the foreign relations of the United States with Switzerland. The HVIRA is inconsistent with the August 9, 2000 settlement of class action claims against Swiss interests in the United States District Court for the Eastern District of New York, as well as with a joint Swiss-United States undertaking on Holocaust-related claims. In addition, by requiring Swiss companies to provide confidential information from Switzerland, the HVIRA would compel the violation of Swiss sovereignty and Swiss privacy laws. Finally, the Ninth Circuit's decision conflicts with rulings of this Court and the U.S. Courts of Appeals for the First and Eleventh Circuits.

Based on these factors, this Court should reverse the Ninth Circuit's decision and hold that the HRIVA is unconstitutional.

ARGUMENT

A. The HVIRA Is Inconsistent With a Pre-Existing Settlement Agreement Between Swiss Industry, Class Action Plaintiffs, and the World Jewish Restitution Organization That Is Supported by the Swiss and United States Governments

On August 9, 2000, the U.S. District Court for the Eastern District of New York formally approved a settlement agreement among Swiss companies, class action plaintiffs, and the World Jewish Restitution Organization regarding World War II era claims in the case *In re: Holocaust Victims Assets Litigation*, 96 Civ. 4849, 2000 U.S. Dist. Lexis 15644 (E.D.N.Y. Aug. 9, 2000). The settlement agreement, which includes payment to the class action plaintiffs of $1.25 billion, by its terms provides for complete legal and material

resolution of Holocaust-related issues for all of Switzerland, with the express exception of three Swiss insurers.[2]

The Swiss and United States Governments have formed a Joint Economic Commission ("JEC"), comprised of senior representatives of the two governments. In a Joint Statement issued through the JEC on January 29, 2000, the Swiss and United States Governments reaffirmed their determination to maintain open markets and to promote bilateral market access for trade, finance and investment, including the insurance industry. With regard to Holocaust-related matters, the JEC commended Switzerland's ongoing efforts and specifically:

> welcom[ed] the settlement that was achieved in In Re Holocaust Victim Assets Litigation . . . which . . . when approved will be recognized by all interested parties as complete legal and material resolution of Holocaust related issues for all of the Swiss economy . . . and for the Swiss government.

ER 2384-85.[3]

The application of the HVIRA to Swiss companies (other than the three specifically exempted from the settlement) would interfere with the settlement agreement's release of the Swiss economy and would be inconsistent with the policies of the Swiss and United States Governments supporting that settlement.

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[2] The three exempted insurers are Basler Lebensversicherungs-Gesellschaft, Zurich Lebensversicherungs-Gesellschaft, and Winterthur Lebensversicherungs-Gesellschaft.

[3] Citations to "ER" refer to the Excerpts of Record in the preliminary injunction appeal to the Ninth Circuit.

B. The HVIRA Conflicts With a Joint Endorsement of the International Commission on Holocaust Era Insurance Claims by the Swiss and United States Governments

The JEC's January 29, 2000 Joint Statement specifically addressed the issue of insurance claims by stating that the two governments:

> further welcom[ed] the ongoing constructive discussions in the framework of the International Commission on Holocaust Era Insurance Claims ... on unpaid policies of European insurance companies dating from [the World War II] period, as an appropriate forum for resolving Holocaust related issues for those three Swiss insurance companies not [released] by the Swiss settlement.

ER 2385.

In the Action Plan annexed to the Joint Statement, the United States Government pledged to "call on State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers." ER 2390.

The JEC Joint Statement and the associated United States Government assurances are of great importance to Switzerland and Swiss industry, and accordingly the Government of Switzerland has expressed concern to the United States Government and the United States courts about the HVIRA on a number of occasions. For example, on April 6, 2000, the Government of Switzerland presented to the United States Government an Aide-Mémoire expressing its opinion that state laws such as the HVIRA would violate Swiss sovereignty and international law. App., *infra*, A-1. On June 2, 2000, the Government of Switzerland sent its views on the HVIRA directly to the district court. ER 2375. On August 9, 2000, the Government of Switzerland presented

a diplomatic note to the United States Government regarding this case, in which it requested that the United States Government submit a brief as *amicus curiae* to the Ninth Circuit re-affirming the view that State legislative bodies should refrain from threatening or imposing sanctions against Swiss insurers. App., *infra*, B-1. The Government of Switzerland later submitted a brief as *amicus curiae* to the Ninth Circuit in support of the Petitioners' request for a rehearing *en banc* before the case was remanded to the district court, and submitted a brief as *amicus curiae* supporting the granting of the petition for certiorari in this appeal.

The Government of Switzerland is particularly concerned that actions taken by the State of California under the HVIRA will jeopardize the work of the International Commission on Holocaust Era Insurance Claims, which was formed to address issues of unpaid World War II era insurance claims. In the view of the Government of Switzerland, that commission is the most effective and expeditious vehicle for resolving unreceived and as yet unsettled insurance claims from the World War II era that are not already covered by the settlement agreement discussed above.

Finally, the Government of Switzerland notes that the JEC is a continuing initiative, and that since the January 29, 2000 Joint Statement the JEC has engaged in a number of discussions and joint projects on other topics. For example, the JEC has promoted bilateral cooperative efforts on industry biosafety measures to safeguard laboratories and pathogens from terrorist access, and has spearheaded efforts to combat international economic crime, including the blocking of terrorist financing and the freezing of terrorist assets. The JEC also provides a forum for the discussion of bilateral trade issues. *See* Agenda for January 25, 2003 JEC Plenary Session, App., *infra*, C-1. To the extent that the United States Government is unable to implement the joint recommendations of the JEC – such as with respect to the issues involved with the HVIRA – the Government of

Switzerland is concerned that the credibility and effectiveness of the JEC may be undermined.

C. The HVIRA Would Require Swiss Companies to Violate Swiss Law

California lacks jurisdiction, as that concept is commonly understood in international law, to regulate foreign companies with respect to transactions that took place in foreign countries with persons who were not United States citizens or present in the United States at the time of those transactions.[4] In the absence of a genuine connection between the issues involved and United States jurisdiction, the enforcement of the HVIRA against insurance companies headquartered in Switzerland would violate international law and Swiss sovereignty. Furthermore, such enforcement would result in conflicting requirements imposed on the companies concerned to the extent that compliance with the California legislation would require a violation of the applicable Swiss privacy laws, resulting in interference with the Swiss legal system.[5]

In the view of the Government of Switzerland, the HVIRA bears no genuine relation to the regulation of the provision of insurance services in California, but rather is designed to demonstrate that the state of California disapproves of the international cooperative actions taken to facilitate resolution of Holocaust era claims. Especially under

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[4] *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States (1987) § 403 ("[A] state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.").

[5] For example, Article 273 of the Swiss Penal Code prohibits persons in Switzerland from releasing to foreign governments confidential business information relating to third parties, unless certain procedures are followed within Switzerland that ensure that the rights of third parties are appropriately protected. The California statute does not allow for the application of this Swiss law.

these circumstances, the HVIRA's extraterritorial reach cannot be justified.

D. The Ninth Circuit's Decision Conflicts with Holdings of this Court and the U.S. Courts of Appeals for the First and Eleventh Circuits

The Ninth Circuit's decision is inconsistent with holdings of this Court and other Courts of Appeals on the Commerce Clause, the foreign affairs powers of the Executive Branch and the requirements of due process.

In its initial ruling, the Ninth Circuit made the following comment on the January 29, 2000 Joint Statement of the JEC:

> But even if we were to assume that a conflict exists between the Holocaust Act and the Swiss-US Joint Statement with regard to seeking information from Swiss insurers, Congress' action controls in this instance.... [A]s noted, the Swiss-US Joint Statement is not a treaty, and preemption is not an issue here. Plaintiffs' argument that a "policy interest" found in an executive branch "Joint Statement" creating an Economic Commission trumps Congress' express constitutional authority to regulate foreign commerce is incorrect.

Petition for Certiorari App. 54a-55a (footnotes omitted).

There is no dispute that Congress has the authority to regulate foreign commerce, but Congress has not enacted any statute that preempts or otherwise restricts the ability of the Executive Branch to engage in negotiations with Switzerland or other foreign countries regarding resolution of Holocaust-related claims. The interpretation by the Ninth Circuit appears to suggest that, absent the implementation of a formal treaty, the Executive Branch lacks any foreign affairs power worthy of respect by the courts. Such a restrictive interpretation of the foreign affairs authority of the Executive Branch, if allowed to stand, would have significant

consequences for the ability of the federal government to interact with foreign nations.

Although the Ninth Circuit recognized that the Supreme Court's decision in *Zschernig v. Miller*, 389 U.S. 429 (1968), held that a state may not intrude on the federal government's foreign affairs power, it declined to apply that decision. The Ninth Circuit's ruling also is inconsistent with the recent holding of the U.S. Court of Appeals for the First Circuit on the foreign affairs power in *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 49-59 (1st Cir. 1999), *aff'd on other grounds sub nom., Crosby v. National Foreign Trade Council*, 120 S. Ct. 2228 (2000).

Finally, the Ninth Circuit's ruling conflicts with the Eleventh Circuit's decision in *Gerling Global Reins. Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001), which invalidated Florida's Holocaust Victims Insurance Act. Like the HRIVA, the Florida statute imposed reporting requirements on the Florida affiliates of European insurers that issued policies during the Holocaust to facilitate civil lawsuits for World War II era claims. The Eleventh Circuit held that the Florida statute violated due process limits on Florida's legislative jurisdiction. Notwithstanding the Ninth Circuit's attempt to distinguish *Gallagher*, the facts and issues presented in these two cases were virtually identical. The Government of Switzerland believes that the reasoning of the Eleventh Circuit in *Gallagher* is persuasive and is equally applicable to the HVIRA.

CONCLUSION

For the foregoing reasons, the Court should reverse the Ninth Circuit's decision and hold that the HRIVA is unconstitutional.

Respectfully submitted,

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February 24, 2003

APPENDIX A

AIDE MÉMOIRE

Several US States - inter alia Florida, California and Washington State - have enacted special legislation in the context of unrecovered insurance policies dating from the World War II period. These pieces of legislation require insurance companies doing business in the States concerned to provide comprehensive information on individual insurance policies under the threat of severe penalties, including the suspension of the companies' business license. Considering the clearly extraterritorial scope of these laws, their enforcement against insurance companies headquartered in Switzerland can be considered a violation of international law and Swiss sovereignty, which is liable to result in conflicting requirements imposed on the companies concerned to the extent that full compliance with the special State legislation would most likely imply a violation of applicable Swiss penal and data protection laws.

The Swiss Government is concerned about this situation and the renewed threat of sanctions and administrative harassment in a number of US States against European insurance companies, including Swiss companies. It considers that such threats or the actual use of sanctions, on the basis of potentially discriminatory and otherwise legally contestable State legislations, is in contradiction with the spirit of cooperation that the Swiss and US governments have reaffirmed at Davos and could strain the bilateral relations between Switzerland and the United States. Moreover, such threats or sanctions are completely unjustified as well as counter-productive in the light of the Swiss Settlement Agreement as well as the cooperative attitude of the Swiss insurance companies concerned.

The Swiss Government holds the view that this issue needs to be promptly addressed by the U.S. Government.

APPENDIX B

EMBASSY OF SWITZERLAND

The Embassy of Switzerland presents its compliments to the United States Department of State and has the honor of requesting its assistance in relation to the case of Winterthur International America Insurance Company, et al. v. Chuck Quackenbush, Insurance Commissioner for the State of California (Case No. CIV. S-00-779 [JFM]), in which the California Holocaust Victim Insurance Relief Act (the "California HVIRA") is being challenged by several insurers that do business in the State of California.

The California HVIRA purports to impose obligations on Swiss and other foreign companies "related" to U.S. companies, notwithstanding the fact that those companies are not engaged in business in California or indeed in the United States. It is the understanding of the Government of Switzerland that if the related Swiss companies do not comply with the directives of the California Insurance Commissioner under the HVIRA, their U.S. affiliated companies could be sanctioned and lose their licenses to conduct business in California.

Because of the extraterritorial scope of this legislation and the absence of a genuine connection between the issues involved and U.S. jurisdiction, its enforcement against insurance companies headquartered in Switzerland would violate international law and Swiss sovereignty. Furthermore, such enforcement would result in the imposition of conflicting requirements on the companies concerned to the extent that compliance with the California legislation would require a violation of the applicable Swiss penal and data protection

laws. The Government of Switzerland is concerned about potential attempts to interfere with the Swiss legal system.

The Government of Switzerland is also concerned that enforcement of this legislation would interfere with the Class Action Settlement Agreement reached in In Re Holocaust Victim Assets Litigation ("Swiss Settlement"). The Swiss Settlement by its terms provides for complete legal and material resolution of Holocaust-related issues for all of Switzerland, with the exception of three Swiss insurers which are involved in separate lawsuits. The California HVIRA conflicts with the Swiss Settlement's release of all other Swiss insurance companies and therefore is inconsistent with United States and Swiss government policies supporting the Settlement.

In addition, the issues referred to in the California HVIRA have been specifically addressed in the framework of the Joint Economic Commission ("JEC") recently established by our governments. A Joint Statement issued on the occasion of the inaugural meeting of the JEC specifically "welcom[ed] the settlement that was achieved in In Re Holocaust Victim Assets Litigation . . . which . . . , when approved will be recognized by all interested parties as complete legal and material resolution of Holocaust related issues for all of the Swiss economy [including the banking, insurance and manufacturing sectors] . . . and for the Swiss government." The JEC "further welcom[ed] the ongoing constructive discussions in the framework of the International Commission on Holocaust Era Insurance Claims ("Eagleburger Commission") on unpaid policies of European insurance companies dating from [the World War II] period, as an appropriate forum for resolving Holocaust related issues for those three Swiss insurance companies not [released] by the Swiss settlement." The JEC stated that it would "address issues related to potentially disruptive and counterproductive effects of investigative initiatives or the threat or actual use of sanctions on a sub-federal level against insurers, including

those that are part of the Swiss settlement or that are participants in the Eagleburger Commission."

In the Action Plan annexed to the Joint Statement, the U.S. Government pledged to "call on the U.S. State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers."

The Government of Switzerland has on several recent occasions expressed concern to the U.S. Government about State actions related to Holocaust insurance issues. Most recently, on April 6, 2000, the Government of Switzerland presented to the U.S. Government an Aide-Mémoire requesting prompt attention to this issue and expressing concern that such laws as the California HVIRA violate Swiss sovereignty and international law and may cause involved Swiss insurance companies to violate Swiss laws. The Government of Switzerland further objected to laws such as the California HVIRA on the grounds that they are potentially discriminatory against Swiss financial industries and a potential cause of strain on relations between the two countries. The Aide-Mémoire pointed out that laws such as the California HVIRA are counter-productive in light of the efforts and cooperative attitude of Swiss insurance companies in this matter.

Consistent with our understanding of the Department of State's policy of encouraging foreign governments to communicate directly with the United States Courts, the Government of Switzerland attempted to submit its views on this matter in a letter dated June 2, 2000 to the federal district court in which the case is being heard. The Embassy of Switzerland has learned, however, that on July 31, 2000, the court stated that it would not accept submission of the letter for procedural reasons. The Embassy therefore requests that the Department of State forward a copy of this note to the court on its behalf.

The Government of Switzerland is informed that a preliminary decision of the district court imposing a preliminary injunction against enforcement of the California HVIRA is currently pending before the Court of Appeals for the Ninth Circuit. The Government of Switzerland hereby requests that the United States Government make a submssion to the Court of Appeals, re-affirming the position of the Joint Economic Commission that the International Commission on Holocaust Era Insurance Claims is the appropriate forum for resolving remaining pertinent issues and that State authorities should refrain from taking unwarranted investigative initiatives or from threatening or imposing sanctions against Swiss insurers that would be liable to cause serious, irreparable damage to the companies concerned.

The Embassy of Switzerland avails itself of this opportunity to thank the United States Department of State for its cooperation and to renew the assurances of its highest consideration.

Washington, D.C., August 9, 2000

United States Department of State
Washington, D.C.

JEC PLENARY SESSION
SATURDAY – JANUARY 25, 2003 - DAVOS

A. During Secretary Thompson's Participation

1. Bioterrorism Cooperation: Completing U.S.-Swiss industry initiative for promoting worldwide industry "biosafety" measures to safeguard labs and pathogens from terrorist access;

(ENCOURAGING CONTINUED ENGAGEMENT OF U.S. AND SWISS PHARMACEUTICAL INDUSTRIES TO COMPLETE A BIOSAFETY CODE TO FIGHT BIOTERRORIST ACCESS TO LABS)

2. FDA-Swissmedic Regulatory Cooperation: Cooperation between U.S. FDA and Swissmedic in Steps Toward a Mutual Recognition Agreement for Pharmaceutical and Medical Device Products:

(CURRENT STATE OF PLAY BETWEEN FDA AND SWISSMEDIC ON THEIR WORKPLAN. POLITICAL LEVEL SUPPORT FOR CURRENT PACE?)

B. Fighting Terrorism and International Economic Crime

1. Blocking Terrorist Financing / Freezing Terrorist Assets: Improving bilateral communication; projects for capacity building in developing financial centers;

(REPORT ON U.S.-SWISS COOPERATION TO DATE / WHAT'S NEXT IN FIGHT AGAINST TERRORIST FINANCING? POSSIBLE JOINT EFFORTS TOWARDS CAPACITY BUILDING FOR

BETTER FINANCIAL CENTER DUE DILIGENCE; SUPPORT FOR FATF PROCESS)

2. US Security Measures, including Container Security Initiative (CSI) and Impact on Int'l trade:
(CONSULTATIONS ON THE EFFECTS OF U.S. SECURITY MEASURES ON SWISS COMPANIES; IDENTIFICATION OF MEASURES THAT COULD INFLUENCE BILATERAL TRADE)

C. Corporate Governance Reforms, Including Sarbanes-Oxley Act

1. Impact of Corporate Oversight Measures: Consultation on Sarbanes-Oxley and Auditing Reforms' International Impact;
(CONSULTATIONS ON THE EFFECT OF U.S. REFORM MEASURES ON SWISS COMPANIES AND INT'L FIRMS BASED IN SWITZERLAND. DISCUSSION OF GOVERNMENT SCOPE FOR STRENGTHENING LEGAL OR SELF-REGULATORY STRUCTURES TO ENSURE BETTER CORPORATE GOVERNANCE.)

D. Cooperative Development Efforts in Southeast Europe and Central Asia

1. Southeast Europe Economic Stability: Report on progress in creating structures conducive to private investment;
(ASSESSMENT OF PROGRESS FOR STABILITY PACT AND OTHER ASSISTANCE EFFORTS BY BOTH SIDES)

2. **World Summit on Sustainable Development-WSSD:** Follow Up: Joint Development Outreach to Central Asia: Trade Capacity Building;
(LAUNCHING U.S.-SWISS PARTNERSHIP AS FOLLOW UP TO WSSD)

E. Bilateral and Multilateral Trade and Investment Issues

1. **Holocaust Assets:** Resolution of Insurance Claims;
(UPDATE ON CURRENT PROGRESS THROUGH EAGLEBURGER COMMISSION)

2. **WTO/Trade Issues:** Cooperation at Doha; including TRIPS issue for pharmaceuticals; steel
(REPORT ON OUR DOHA PRIORITIES AND FOLLOW UP)

3. **Trade in Livestock Products:** Resolving Disputes over U.S. beef entry to Swiss market and Swiss dried beef access to U.S.
(REPORT ON CURRENT DIALOGUE (ROAD MAP) TOWARDS RESOLVING IMPORT OF DRIED BEEF TO U.S. AND IMPORT OF U.S. BEEF TO SWITZERLAND)

4. **Thomas Bill:** Potential impact on foreign direct investment

5. **Telecommunication:** Provisioning of Leased Lines and Unbundling the Last Mile

(SWISS UPDATES ON TELECOM POLICY REFORMS)

F. Export Controls

1. Non-proliferation and Export Controls: Progress in strengthening Wassenaar, the CWC, and other instruments.

(EXCHANGE OF VIEWS ON ISSUES THAT NEED TO BE ADDRESSED TO IMPROVE COORDINATION OF REGIMES CONTROLLING EXPORTS OF ARMS AND DUAL-USE TECHNOLOGIES)

G. Science and Technology Cooperation

1. Science and Technology Framework Agreement (STFA): Promoting synergy between research and industry;

(MERITS OF A POSSIBLE U.S.-SWISS S&T FRAMEWORK AGREEMENT)